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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 MARK I. SOKOLOW, et al.

4 Plaintiffs

5 v.

04 CV 397 (GBD)

6 THE PALESTINE LIBERATION  
7 ORGANIZATION, et al.

8 Defendants

-----x

9 New York, N.Y.  
10 August 9, 2012  
11 11:00 a.m.

12 Before:

13 HON. GEORGE B. DANIELS

14 District Judge

15 APPEARANCES

16 DAVID I. SCHOEN Attorney at Law  
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LAURA FERGUSON

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(In open court)

THE DEPUTY CLERK: Mark Sokolow v. Palestine  
Liberation Organization 04 CV 397.

Please stand and state your name for the record  
starting with the plaintiffs.

MR. SCHOEN: Good morning, your Honor. David Schoen  
for the plaintiffs.

THE COURT: Good morning, Mr. Schoen.

MS. MURPHY-JOHNSON: Good morning, your Honor. Dawn  
Murphy-Johnson and Laura Ferguson on behalf of the defendants.

THE COURT: Good morning.

MR. FERGUSON: Good morning.

THE COURT: Let me first hear from defendants with  
regard to the motion.

MS. MURPHY-JOHNSON: Would you prefer that I come to  
the podium?

THE COURT: It would probably be easier for the court  
reporter.

MS. MURPHY-JOHNSON: Your Honor, this is a complex  
case that was filed in 2004 by 42 plaintiffs involving seven  
attacks that occurred around Jerusalem between 2001 and 2004.

The complaint asserts 13 counts against the  
defendants. The first count is a Federal Anti-Terrorism Act  
claim. The second through 13th counts are a mix of non-federal  
claims and a variety of theories of liability and theories of

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1 damages.

2 The defendants have moved to dismiss plaintiffs  
3 non-federal claims based on the defendant's lack of capacity to  
4 be sued for those claims. Those non-federal claims are the  
5 second count which is wrongful death, the fourth count which is  
6 battery, the fifth count which is assault, the seventh count  
7 which is negligence, the eighth count which is the intentional  
8 infliction of emotional distress, and the ninth count which is  
9 the negligent infliction of emotional distress. The plaintiffs  
10 have also alleged in their papers that the sixth count, loss of  
11 solatium and consortium is a cause of action.

12 Under Federal Rules of Civil Procedure 17(b)(3), the  
13 law of the forum state controls the capacity of an  
14 unincorporated association to be sued for non-federal claims,  
15 and here that's New York General Associations's Law Section 13  
16 under which an unincorporated association cannot be sued in its  
17 own name. And here the PA and PLO, which are unincorporated  
18 associations, have been sued in their own names warranting  
19 dismissal of those claims.

20 THE COURT: Let me first start out with a basic  
21 question, because the PLO has been in litigation before and has  
22 taken different positions on that issue. Is it your position  
23 that you are conceding, admitting, acknowledging that the PLO  
24 is in fact an unincorporated association?

25 MS. MURPHY-JOHNSON: Well, your Honor, for purposes of

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1 this motion, yes.

2 THE COURT: All right. That's not the way I phrased  
3 it, because for purposes of -- the real question is not for  
4 purposes of this motion. The real question is one of two: If  
5 that is what you acknowledge and admit, then that's going to be  
6 the PLO's acknowledgment and admission, and every judge is not  
7 going to have to go through this depending on what's to the  
8 advantage or disadvantage of either party in terms of what they  
9 want to assert. But this is really your affirmative defense.

10 MS. MURPHY-JOHNSON: Right.

11 THE COURT: So, you have to tell me whether or not you  
12 say that you're asserting this as an affirmative defense  
13 because in fact the PLO is an unincorporated association and  
14 acknowledges that and admits that and concedes that, and your  
15 position is there's significant evidence to support this court  
16 and every other court to make that determination for now and  
17 all time.

18 MS. MURPHY-JOHNSON: Well, as you are aware, your  
19 Honor, historically, the PA and the PLO have argued that they  
20 should be recognized as states or as nations, and routinely  
21 every court that's addressed that issue has rejected that.

22 THE COURT: Right.

23 MS. MURPHY-JOHNSON: So, we have come to the point  
24 where we have to acknowledge that we are unincorporated  
25 associations because the courts refuse to acknowledge the

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1 defendant's status as states.

2 THE COURT: Well, let's put it this way, you have yet  
3 to convince a court that you have any evidence to demonstrate  
4 something other than that, so I'm trying to understand whether  
5 or not you -- again, this is your affirmative defense. It's  
6 not a question of everybody else has done it so I should do it  
7 too. It seems to me it's a question of fact, and either you  
8 say that that is the fact or you say that that is not the fact.  
9 It's a little awkward for me to have you argue that I should  
10 make decisions on that basis, not because you say it's so, but  
11 because you say other judges have assumed that to be the case.

12 MS. MURPHY-JOHNSON: Could I seek the Court's  
13 permission to have Ms. Ferguson address this particular  
14 question?

15 THE COURT: Surely. Whoever has a straight answer for  
16 me can address the question.

17 MR. FERGUSON: Ms. Murphy-Johnson is at a disadvantage  
18 because her exposure with the case is a little more recent than  
19 mine. I have been representing the PA since 2007. I am  
20 familiar with the litigation history of the immunity question,  
21 so if I could clarify. Predecessor counsel, since the lawsuits  
22 began in the U.S. against the PA and the PLO, argue that the PA  
23 should be treated as a sovereign state.

24 THE COURT: Right.

25 MR. FERGUSON: And that argument really focused on the

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1 PA rather than the PLO. There is not really a conceivable  
2 argument that the PLO has any even quasi-state status, but the  
3 PA, they argued, as a quasi-state should be accorded sovereign  
4 immunity. And the courts acknowledged -- the courts found that  
5 the facts just weren't there to support it. In fact, the whole  
6 conflict is over the PA's desire to be recognized as a state.  
7 That hasn't happened yet. So, when my firm came in to  
8 represent the PA and PLO, we recognized that there was no  
9 sovereign immunity defense, and that the cases needed to be  
10 litigated on the merits. So, that's what we've proceeded to  
11 do.

12 So we are not making a state to a claim for the PLO.  
13 We are not making a state to a claim for the PA. If at some  
14 point the PA becomes a recognized state, that would be  
15 different, but here and now the PA is not a recognized foreign  
16 state.

17 THE COURT: That's even not my issue. I am not asking  
18 you whether you contend or don't contend in this litigation  
19 that the PA or PLO is a sovereign state. That's not the  
20 question. The question is solely the question of whether or  
21 not -- I mean, it has been debated back and forth in almost  
22 every single case in which the PLO is in, not just the issue of  
23 whether it's a sovereign state, but because the determination  
24 of whether it is or isn't a sovereign state is not a  
25 determination that it is or is not an unincorporated

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1 association.

2 The only question before me is whether or not in fact  
3 the PLO and the PA have the status of being an unincorporated  
4 association. If that is your position, whether or not it is or  
5 isn't a sovereign state, whether or not for all purposes -- for  
6 purposes of service, for purposes of standing, for every other  
7 purpose -- if you are urging me to make the conclusion that you  
8 say is acknowledged by the PA and PLO, that you are in fact an  
9 unincorporated association.

10 MR. FERGUSON: There is only a certain number of  
11 potential baskets the PA and PLO can fall within.

12 THE COURT: I mean, I don't know.

13 MR. FERGUSON: We are not a corporation, not a  
14 partnership, not a state.

15 THE COURT: If you say so.

16 MR. FERGUSON: Right. Yes, I think the best framework  
17 for these are sui generis entities is under the Federal Rules  
18 of Civil Procedure and unincorporated association, and that's  
19 how the courts have treated the PLO, how the Southern District  
20 of New York treated the PLO in the *Klinghoffer* case. That's  
21 how the District of Columbia has treated the PA and the PLO in  
22 the *Kliman* and *Parsons* case, as unincorporated associations.  
23 We accept that designation. And even the plaintiffs have  
24 acknowledged the PLO is an unincorporated association.

25 THE COURT: Well, but that is where I have to start

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1 because I have been asked basically to take judicial notice of  
2 this fact. While I can take judicial notice that the other  
3 courts in their resolutions of the issues that were before them  
4 said for the purpose of those issues that the PLO is an  
5 unincorporated association, that isn't quite judicial notice.  
6 I'm not sure that it's appropriate for me to take judicial  
7 notice that that is in fact true because another judge has  
8 ruled that way. If that was the case, I couldn't disagree with  
9 my colleague next door because they ruled one way and I've  
10 decided to rule a different way. I can take judicial notice  
11 that they've ruled that way, but I can't take judicial notice  
12 that that's either a fact independently or that that is the  
13 legal consequence for all time in every case or even if I had  
14 made the same decision, given the same set of circumstances  
15 that I would have made the same judgment.

16 So, as I say, my attitude is it's more in the hands of  
17 the PLO and the PA as to what it is that you say the facts  
18 demonstrate that you are rather than an argument that simply  
19 you've made the opposite argument and have lost that argument,  
20 and so, therefore, since you've lost the argument, everybody  
21 else has to accept it in every litigation even though your  
22 position might be different.

23 MR. FERGUSON: Your Honor, I don't think there is much  
24 dispute or uncertainty about what the basic facts are of what  
25 the PA is or what the PLO is. The question is, how do you



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1 categorize that sort of sui generis entity for purposes of the  
2 U.S. Federal Rules of Civil Procedure.

3 THE COURT: Well, no, I think that there is --look,  
4 the fact is that it may or may not be my role, but I know  
5 what's going to happen; that if you are going to argue to me,  
6 literally, and I think it's appropriate, it's time to stop  
7 debating this issue depending on whether it's to the advantage  
8 of some plaintiff or the advantage of the defendant.

9 If you want me to accept the fact that the PLO is in  
10 fact an unincorporated association, then you're going to have  
11 to tell me that, and you tell me that it is and tell me why it  
12 is, and tell me the evidence supports that, and my guess is  
13 that people are going to quote this back to you in future  
14 litigation because I don't think it's appropriate for me to  
15 have you tell me that I should make that determination and the  
16 consequences for that determination in this case, and then you  
17 represent that to me in this case, and then the next case if  
18 it's not to your advantage for either service or some other  
19 purpose, then you want to make the opposite argument because,  
20 you know, this is not --

21 MR. FERGUSON: I accept that, your Honor.

22 THE COURT: -- it's not so much a legal argument. It  
23 is a fact; either you are an unincorporated association or  
24 you're not an unincorporated association, and you have to tell  
25 me whether or not you believe it is so, and you have to tell me

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1 on what basis you believe that, particularly in this context  
2 because this is your affirmative defense.

3 MR. FERGUSON: Right. I believe the PLO is an  
4 unincorporated association. I believe it should be treated as  
5 an unincorporated association because it is sort of an umbrella  
6 group for a variety of political parties and factions who share  
7 a common purpose of a Palestinian national movement with  
8 recognition of a Palestinian state. It's not incorporated. It  
9 is a loose affiliation of members who share a common purpose.  
10 So it best falls under the rubric of an unincorporated  
11 association.

12 THE COURT: On what basis do I even have in this  
13 record at this stage of the proceeding to say that the PLO has  
14 members? Who are the PLO's members?

15 MR. FERGUSON: Your Honor, I could first say that the  
16 plaintiffs have acknowledged the PA is an unincorporated  
17 association. Their argument is that the law where it is --  
18 where the association was formed to govern its capacity to be  
19 sued, but they don't contend that it's not an unincorporated  
20 association. There is no dispute between the parties about the  
21 PLO's status.

22 But with respect to the membership of the PLO, the PLO  
23 represents all the Palestinians, including the Palestinians  
24 that are in the Diaspora, so those that are not in the West  
25 Bank and the Gaza Strip. And they represent all those

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1 Palestinians who share in the Palestinian national movement.

2 THE COURT: That's not the definition of an  
3 unincorporated association. The fact that they take the  
4 position that they represent the interest of all of those  
5 individuals does not make all of those individuals members of  
6 the PLO. That is not the definition of an unincorporated  
7 association for legal purposes.

8 MR. FERGUSON: Well, I can refer the Court to the  
9 *Kliman* decision in the District of Columbia where it concluded  
10 that the PLO fell within the definition of unincorporated  
11 association precisely because it's composed of individuals  
12 without a legal identity -- I'm quoting from the *Kliman*  
13 decision from the District of Columbia.

14 It has been determined by other federal courts that  
15 the PLO qualifies as an unincorporated association because it  
16 is "composed of individuals without a legal identity apart from  
17 its membership formed for specific objectives." Citing the  
18 *Ungar* decision from Rhode Island and also the *Klinghoffer*  
19 decision from this court.

20 So, with respect to the PA, again, it's this problem  
21 of a sui generis entity. It has an executive branch. It has a  
22 legislative branch. It has courts. It took the position we  
23 are close enough to a state, we should be treated as state for  
24 some purposes. That's been rejected.

25 THE COURT: I understand that.

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1 MR. FERGUSON: So that's why I accept that the next  
2 best framework is unincorporated association.

3 THE COURT: But there is no such thing as a default  
4 framework. You see what I'm saying? So you can't say that  
5 because it's not an apple, it must be an orange. That's not  
6 the way it works. As I say, you have to tell me why you say  
7 it's unincorporated -- is your position that the PA is an  
8 unincorporated association?

9 MR. FERGUSON: Yes, it is, and because we have to pick  
10 a set of rules that govern capacity to be sued, that govern  
11 service of process, that govern immunity, and we have to define  
12 for U.S. law purposes how we're going to treat the sui generis  
13 purposes for purposes of applying the Federal Rules of Civil  
14 Procedure.

15 THE COURT: But you are defining that because you give  
16 me a set of factors that meet that definition, and then you  
17 tell me why the PA or the PLO meets those factors. It's not an  
18 analysis that if the PLO or the PA has been rejected, it's one  
19 thing, they must be by default something else, that's an  
20 unincorporated association. That's not true. Because if  
21 you're not a state, you could be a corporation. You could be,  
22 you know, a partnership. There are a lot of things you could  
23 be depending on the facts.

24 So, the question is not, you know, is there a space to  
25 push them in. The question is what is the nature of the

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1 organizations, and in what way does the nature of that  
2 organization meet the requirements of being an unincorporated  
3 association? Now, you know, this first question may be much  
4 ado about nothing because when I ask them the same question,  
5 they may say to me, well, Judge, that's what we think they are,  
6 and then they have to give me a good reason then why they  
7 shouldn't be treated that way for all purposes.

8 But I just want to first start out with the premise  
9 because almost every other case you've cited to me in which the  
10 court ruled that -- and not in all contexts, but in most  
11 contexts it had to deal with the issue of service, but there  
12 were some cases that also had to --

13 MR. FERGUSON: The *Parsons* case specifically addressed  
14 the capacity of the Palestinian Authority to be sued for  
15 non-federal law claims.

16 THE COURT: But in every one of those cases, my  
17 recollection is -- and you correct me if I'm wrong -- in every  
18 one of those cases the PLO and the PA took the opposite  
19 position, said that they were not.

20 MR. FERGUSON: That they were not?

21 THE COURT: Unincorporated associations.

22 MR. FERGUSON: I don't think that's the case in  
23 *Parsons*, your Honor.

24 THE COURT: You think the case in *Parsons* -- I have to  
25 look at that, but I don't -- I'm not sure they even

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1 specifically took that position. Maybe in *Parsons* they took  
2 the position for the purpose of capacity and --

3 MR. FERGUSON: In *Parsons* we did not argue sovereign  
4 immunity. That was one of the recent cases that was filed --

5 THE COURT: Right. And my recollection was that not  
6 in *Parsons* that you said -- I don't know if you were in  
7 *Parsons*.

8 MR. FERGUSON: I think how we framed it is that the PA  
9 and the PLO -- or especially the PA has argue stages. That has  
10 been rejected. The PA accepts that that's the consistent  
11 ruling of the U.S. courts and, therefore, the PA should be  
12 treated as an unincorporated association, as the court did in  
13 *Kliman*.

14 THE COURT: I remember everything that you just stated  
15 except the fact that you say you accept that. I'm not sure  
16 that I read -- I don't know what the underlying position was,  
17 but in the case law that I read, I am not sure that you said we  
18 accept the fact that we are unincorporated association.  
19 Obviously, you wanted the benefit of excluding the cause of  
20 action, the underlying cause of action, if that was what the  
21 finding was going to be, but I'm not sure that you urged upon  
22 the court that in any of those cases that the PA and/or the PLO  
23 was in fact an unincorporated association.

24 MR. FERGUSON: I can tell you that the PA is no longer  
25 standing on sovereign immunity claims and takes the position

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1 that it's best treated for the Federal Rules of Civil Procedure  
2 as an unincorporated association, and that's what the courts  
3 consistently have done.

4 THE COURT: Well, best treated is not --

5 MR. FERGUSON: Well, it's not a corporation. It's not  
6 a partnership. What is it is the problem.

7 THE COURT: Well, no, I understand that, but the  
8 question before me is not what it's best treated as. The  
9 question before me is whether you have an affirmative defense  
10 of lack of capacity to be sued because you are in fact an  
11 unincorporated association. Isn't that really the only issue  
12 for me at this point?

13 MR. FERGUSON: There are two issues before you. One  
14 is whether there's a capacity to -- whether the PA and PLO have  
15 the capacity to be sued. The second is whether the Court  
16 should decline exercise of supplemental jurisdiction.

17 THE COURT: But I haven't gotten to that yet.

18 MR. FERGUSON: But with respect to the capacity  
19 question, yes, a threshold determination undoubtedly is that  
20 the PA and PLO are unincorporated associations. I don't think  
21 there's any dispute as to the PLO.

22 As to the PA, you know, it's a group of Palestinians  
23 living in the West Bank and Gaza Strip, and there is a  
24 governmental structure there, but it is not treated as a state.

25 THE COURT: But as you just described it is not the

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1 definition of an unincorporated association.

2 MR. FERGUSON: The question is then how do we  
3 determine this thing's capacity to be sued and how it should be  
4 served?

5 THE COURT: I don't know, but that's not my issue at  
6 this point. The only issue for me right now is whether or not  
7 in fact the PA should be dismissed from this case because --

8 MR. FERGUSON: Certainly we're not -- right, the  
9 Anti-Terrorism Act may continue the court case.

10 THE COURT: Yes, I misstated it. Whether or not  
11 the -- I'll call them the common law clauses of action.

12 MR. FERGUSON: Right.

13 THE COURT: The common law causes of action should be  
14 dismissed because it is an unincorporated association and the  
15 law indicates that an unincorporated association does not have  
16 the capacity to be sued.

17 MR. FERGUSON: Your Honor, I can't stand here and kind  
18 of neatly tick off the elements of the PA and sort of link them  
19 directly to a definition of unincorporated association. Courts  
20 that have looked at this issue have found that that's the best  
21 framework. That's really all I can offer you. But if this  
22 seems too -- you know, the fact that the PA is so sui generis  
23 that it makes it difficult to resolve the capacity argument,  
24 then that is really sort of another reason that the Court  
25 should not take on the seven non-federal law claims because,



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1 again, this is another aspect of the complexity that these  
2 claims bring to the case.

3 THE COURT: Then the way I am trying to analyze it is  
4 that may or may not be -- that may be correct, but the question  
5 is, does that mean that this can be resolved at this stage of  
6 the proceeding rather than at a later stage of the proceeding.

7 MR. FERGUSON: I cannot contemplate any discovery that  
8 would shed any light on whether the Palestinian Authority  
9 should be treated as an unincorporated association. The Oslo  
10 Accords that set up the Palestinian Authority are widely  
11 available. They're a matter of public record. So the  
12 structure of the PA is well-known. There is no discovery that  
13 would aid this inquiry. Ultimately, we're left with the sui  
14 generis entity and we have to decide what basket it best fits  
15 into. I recognize this is a novel question and it doesn't fit  
16 neatly into any of the baskets, but that's what we're left  
17 with. I think I've hijacked Ms. Murphy-Johnson's argument.

18 THE COURT: Go ahead.

19 MS. MURPHY-JOHNSON: I am looking at to where we  
20 should next go.

21 THE COURT: I mean, your basic argument is fairly  
22 straightforward.

23 MS. MURPHY-JOHNSON: It is.

24 THE COURT: And your basic argument is that -- if I  
25 articulate it correctly -- that the PLO, that you have an

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1 affirmative defense that requires no further factual  
2 examination, and that affirmative defense is that the PLO and  
3 the PA are unincorporated associations, meet that definition  
4 for all purposes, and, therefore, whatever rules apply to an  
5 unincorporated association with regard to the common law claims  
6 should apply in this case.

7 MS. MURPHY-JOHNSON: Correct.

8 THE COURT: Fairly straightforward argument. I can  
9 accept that if everyone says to me that that's the way the  
10 issue is to be viewed. As I say, it doesn't make the case go  
11 away. The only thing I disagree with initially in terms of the  
12 proposition is that I think all of the claims that you ticked  
13 off, other than the last claim, would fall into that category  
14 because I'm not sure that -- was it Count Six?

15 MS. MURPHY-JOHNSON: Yes.

16 THE COURT: I'm not sure that Count Six would qualify  
17 as an independent cause of action.

18 MS. MURPHY-JOHNSON: Right, and we take that position  
19 as well.

20 THE COURT: They can explain to me if they think that  
21 that's an independent cause of action, but I don't know of any  
22 underlying elements of liability that independently prove to  
23 demonstrate that as an independent cause of action unless  
24 you've established an underlying cause of action. That seems  
25 to me to be also related to the issue of damages. I thought

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1 that the plaintiffs pretty much argued that or at least lumped  
2 that into the same category as the other claims, but maybe not.  
3 Hold on just a second.

4 MS. MURPHY-JOHNSON: Your Honor, if I might --

5 THE COURT: Yes.

6 MS. MURPHY-JOHNSON: -- in the plaintiff's opposition  
7 to our motion -- this is DE-196 at page 3 -- the plaintiffs  
8 grouped Count Six in with what they characterized as  
9 garden-variety non-federal causes of action.

10 THE COURT: I'm sorry. Where are you looking, at page  
11 3 of their response?

12 MS. MURPHY-JOHNSON: Yes.

13 THE COURT: Oh, I see. Yes. Then I will discuss that  
14 with them. All right.

15 Well, if you have anything further to say you want to  
16 say about the standing issue, then I will hear you; otherwise,  
17 let's just talk briefly about your argument that I should not  
18 assert supplemental jurisdiction.

19 MS. MURPHY-JOHNSON: Certainly. We'll shift gears  
20 then to that argument.

21 So, independent of this capacity issue, the defendants  
22 request that the Court nonetheless decline to exercise  
23 supplemental jurisdiction over the plaintiff's non-federal  
24 claims under 28 U.S.C. 1367 which states that the Court can  
25 decline to exercise supplemental jurisdiction if non-federal

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1 claims raise complex questions of foreign law or if they would  
2 come to substantially predominate over the federal claim at  
3 issue in the case.

4 We strongly feel that that is what would happen here.  
5 The case is already inherently complex on the federal grounds  
6 alone. There are seven different attacks involved over a  
7 period of three years, all involving different factual  
8 scenarios, potentially different militant groups allegedly  
9 involved. There are 42 plaintiffs.

10 THE COURT: So why should I double that?

11 MS. MURPHY-JOHNSON: Why should you quadruple that?  
12 Quintuple that?

13 THE COURT: Right. But my question is different than  
14 your question. You are asking why should I quadruple that in  
15 this case. I'm saying why should I quadruple that in two to  
16 four different cases? What sense does that make? Why should  
17 you have to go through this twice, here and in another  
18 jurisdiction?

19 MS. MURPHY-JOHNSON: Well, because here doing so would  
20 mean engaging experts on potentially up to four or five  
21 different foreign bodies of law --

22 THE COURT: Well, they argued that -- look, as I said,  
23 this isn't rocket science. Wrongful death is wrongful death.  
24 What expert do I need to tell me -- I don't see any place where  
25 you argued, one, that -- well, I'm not quite sure what your

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1 position is as to where these supplemental claims should be  
2 litigated and what law should apply.

3 MS. MURPHY-JOHNSON: The question of what law should  
4 apply is actually a very complicated one since the Second  
5 Circuit issued its decision in the *Licci* matter. I don't know  
6 if I'm pronouncing that correctly.

7 THE COURT: OK.

8 MS. MURPHY-JOHNSON: There the Second Circuit held  
9 that the law of the jurisdiction having the greatest interest  
10 on litigation should be applied. And then tort cases such as  
11 negligence intentional infliction of emotional distress where  
12 conduct-regulating rules apply, the law of the location where  
13 the tort occurred applies.

14 THE COURT: Who is going to make that determination?  
15 And what are you urging that determination to be?

16 MS. MURPHY-JOHNSON: Well, if I could, I'm not sure  
17 that it necessarily warrants a definitive determination. I  
18 think that the question itself presents so much complexity and  
19 we could engage in years of litigation over which law actually  
20 applies.

21 THE COURT: But why? I understand that in the  
22 abstract, but I don't understand how that applies to this case,  
23 and I am not sure how it makes it more efficient to do that in  
24 two or three different forums when we're all talking about the  
25 same underlying activity --

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1 MS. MURPHY-JOHNSON: Sure.

2 THE COURT: -- that just translates into different  
3 causes of action. I mean, their argument is this: That there  
4 are only two choices. You are either going to apply New York  
5 law or you're going to apply Israeli law. I don't know if you  
6 say there is a third choice, but you haven't articulated a  
7 third choice, so at least we've narrowed it down to two  
8 choices.

9 MS. MURPHY-JOHNSON: If I might articulate that now.  
10 As we attempted to articulate in our June 6 letter to the  
11 Court, because of the *Licci* decision, it does appear that there  
12 is another alternative here, aside from New York law and  
13 Israeli law, and that would be however we would characterize  
14 Palestinian law because that is where the PA and the PLO at  
15 least for some part --

16 THE COURT: Where do I look to find Palestinian law?

17 MS. MURPHY-JOHNSON: Well, yes. That's how --

18 THE COURT: Where does any forum look to find  
19 Palestinian law?

20 MS. MURPHY-JOHNSON: Well, I will tell you.

21 THE COURT: Wait. Stop. So, you are saying that  
22 there is such a thing as Palestinian law that's been applied in  
23 a court of law to resolve these disputes?

24 MS. MURPHY-JOHNSON: I can't say for sure because I'm  
25 not an expert on Palestinian law.

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1 THE COURT: Well, you got to say for sure, otherwise,  
2 I can't accept that argument. You can't just make it up.

3 MS. MURPHY-JOHNSON: I'm not making it up.

4 THE COURT: Well, that's as I say -- let's put it this  
5 way: They argue that there are certain injuries and deaths  
6 that occurred in Israel, so, therefore, under normal  
7 circumstances, given the fact that there are U.S. citizens,  
8 that the -- and I characterize them as the common law causes of  
9 action will either be causes of action under New York law or  
10 causes of action under Israeli law. In the first instance that  
11 makes sense.

12 You say now that there's something else called  
13 Palestinian wrongful death law that is somehow different than  
14 Israeli or New York law that some court needs to go through --  
15 and I'm not sure which court you say needs to do that -- but  
16 some court needs to go through and determine what that is in  
17 order to litigate that issue. Is there something called  
18 Palestinian wrongful death law?

19 MS. MURPHY-JOHNSON: Just like everything else in this  
20 case, that is also a complicated question, and I know that's  
21 not helpful to you.

22 THE COURT: It's not a complicated question. It's a  
23 very simple question. If you can tell me there is such a  
24 thing, then I will say, all right, then somebody has to analyze  
25 that. If you can't tell me that you have a basis to say there

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1 is such a thing, then why is that a consideration for me?

2 MS. MURPHY-JOHNSON: Over history, depending on what  
3 foreign nation has governed the region, those various  
4 countries' laws have been exercised in the Palestinian  
5 territories, and over a time they've all become layered on top  
6 of each other.

7 So, for conduct that occurred in the Gaza Strip,  
8 arguably Ottoman Law could apply because at some period of time  
9 Ottoman Law governed that region. And if certain conduct  
10 occurred in the West Bank, there could be a combination of  
11 British Mandate law, Jordanian Law, Israeli military orders or  
12 Israeli law, but this has all been --

13 THE COURT: Well, what does that have to do with the  
14 plaintiffs wanting to invoke and having available to them to  
15 invoke either the laws of Israel or the laws of New York? If  
16 your argument is that they cannot establish their cause of  
17 action under one of those laws, then you may prevail on summary  
18 judgment or before a jury in being able to convince the Court  
19 or a jury that, no, protections of those laws do not apply  
20 here. But what does that have to do with my declining to  
21 assert jurisdiction over this? How is this somehow easier for  
22 some other court to deal with and address than this Court?

23 MS. MURPHY-JOHNSON: The plaintiffs themselves believe  
24 that they could potentially bring these cases, the non-federal  
25 claims, in Israeli courts.



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1 THE COURT: Right.

2 MS. MURPHY-JOHNSON: But I'm not saying that the  
3 choice is solely between -- and if this court were to exercise  
4 supplemental jurisdiction here, that it's a question of  
5 choosing between New York law and Israeli law. My only extra  
6 additional point is that if this Court were to address these  
7 claims, there is likely this third body of law that's developed  
8 over the past several decades in the Palestinian courts  
9 involving all these different layers of foreign law.

10 So my point is, that if the Court were to accept  
11 supplemental jurisdiction over those claims, even the choice of  
12 law issue alone adds so much complexity to an already complex  
13 case that there is no doubt that these non-federal claims would  
14 come to predominate over the federal ATA claims.

15 THE COURT: But I don't understand in the detail of  
16 that argument what that argument means. It sounds  
17 superficially logical, but what is it that this Court has or  
18 any court has to determine? They will invoke -- and you will  
19 either agree or disagree -- that they have the protection of  
20 either New York State common law or Israeli law, and they will  
21 say that we can prove that those laws do apply and should be  
22 applied and we can prove our cause of action under those laws.

23 MS. MURPHY-JOHNSON: But I think under *Licci* that that  
24 is not accurate any more because the defendants -- if the  
25 defendants solely committed their tortious acts in Israel, then

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1 under *Licci*, Israeli law would arguably apply. But there is a  
2 whole list of allegations in the complaint that the PA and PLO  
3 from their headquarters, which are not in Israel, acted  
4 negligently to, for example, release prisoners who then went on  
5 to allegedly commit these acts.

6 THE COURT: OK.

7 MS. MURPHY-JOHNSON: Or paid people from their  
8 headquarters, which are not in Israel, to commit acts.

9 THE COURT: What does that have to do with a cause of  
10 action for negligence?

11 MS. MURPHY-JOHNSON: I'm sorry?

12 THE COURT: I'm just trying to pick a cause of action.  
13 Explain to me how that complicates any one of these causes of  
14 action.

15 MS. MURPHY-JOHNSON: Because then the PA or the PLO  
16 acted in the West Bank negligently to release a given prisoner  
17 who then went and committed an attack.

18 THE COURT: But that's not the nature of anyone's  
19 claim here.

20 MS. MURPHY-JOHNSON: I'm sorry?

21 THE COURT: That's not the nature of anyone's claim  
22 here.

23 MS. MURPHY-JOHNSON: It is.

24 THE COURT: Whose?

25 MS. MURPHY-JOHNSON: The plaintiffs have alleged that.

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1 THE COURT: Have alleged what?

2 MS. MURPHY-JOHNSON: That the PA or the PLO have  
3 released certain people who were in their custody intentionally  
4 for the purpose of committing acts of terror.

5 THE COURT: OK. Maybe I have to go back to the  
6 complaint again. I will accept your premise for now, but I'm  
7 not quite sure where you say that that requires some other  
8 alternative choice of law.

9 MS. MURPHY-JOHNSON: Well, that's what *Licci* tells us.  
10 In *Licci* the question was -- and, unfortunately, it was a  
11 question between New York law and Israeli law, so I don't want  
12 to cabinet in those terms, but there the court found that  
13 American Express had acted in New York.

14 THE COURT: Right.

15 MS. MURPHY-JOHNSON: Those acts then resulted in  
16 rocket attacks in Israel, but New York law applied because New  
17 York is where American Express took its actions. So what I'm  
18 saying is Palestinian law, however one eventually comes to  
19 define it, would apply to any claim that the plaintiffs have  
20 that the PA acted tortiously within the Palestinian  
21 territories.

22 THE COURT: So who is supposed to decide, and why is  
23 it somehow more convenient for some other court to decide  
24 that -- and even more convenient for the parties for some other  
25 court to decide that rather than in the case in which you

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1 litigated already the issues with regard to the injuries and  
2 deaths for the crime?

3 MS. MURPHY-JOHNSON: Because if it were litigated  
4 here, it adds a substantial layer of complexity.

5 THE COURT: How? All I have to do is decide if you  
6 weren't giving me Ottoman Law. In their brief it says Ottoman  
7 Law applies, and, therefore, this is your defense, I'm sure I  
8 could decide that. That wouldn't take any more time than it  
9 has taken me to decide any of the other motions that I have to  
10 decide.

11 MS. MURPHY-JOHNSON: Because I think, your Honor, it  
12 would become so much more complex because of the number of  
13 claims involved, the number of plaintiffs involved, the  
14 theories of liability, whether it's direct liability or  
15 respondeat superior.

16 THE COURT: That's going to be true whether or not the  
17 supplemental claims went somewhere else or not.

18 MS. MURPHY-JOHNSON: True, but on top of that we would  
19 have to hire experts.

20 THE COURT: You're going to have to do that anyway.

21 MS. MURPHY-JOHNSON: We're going to have to have  
22 translators. Everything is in a foreign language.

23 THE COURT: You're going to have to do that anyway.  
24 I'm sorry, I didn't mean to interrupt you, but I'm trying to  
25 focus you on this issue. Part of my analysis is, you're saying

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1 that -- and you're not saying that I'm required to do it or you  
2 have a right for me to have to settle this on this basis. I  
3 have the discretion to do this, and you're asking me to  
4 exercise my discretion appropriately to do this.

5 My question is, first, if I do this, I must consider  
6 whether there is a reasonable alternative forum for the parties  
7 to litigate this dispute. What do you claim is the reasonable  
8 alternative forum that I should decline jurisdiction over these  
9 claims so that those claims can be litigated in another forum?  
10 Do you understand my question?

11 MS. MURPHY-JOHNSON: I do understand your question,  
12 but to tell you the truth, I'm wondering if that is more  
13 appropriate if this were being raised as a forum non conveniens  
14 argument.

15 THE COURT: But I can't imagine that it would be  
16 appropriate for me to act properly and not abuse my discretion  
17 by declining to assert supplemental jurisdiction over what  
18 would otherwise be valid claims if the consequence of that is  
19 that the plaintiff has no forum in which to litigate those  
20 claims.

21 MS. MURPHY-JOHNSON: Well, the plaintiffs themselves  
22 have said that they believe that Israel could be a proper forum  
23 for these claims.

24 THE COURT: But you say no.

25 MS. MURPHY-JOHNSON: No. I'm saying that Israeli law

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1 might not necessarily apply; not that Israel might not be the  
2 proper forum for the claims.

3 THE COURT: So are you saying that I should decline  
4 jurisdiction over these claims in order that the plaintiffs can  
5 re-assert these claims in an Israeli court if they wish.

6 MS. MURPHY-JOHNSON: Correct.

7 THE COURT: All right. That's all I'm trying to say.

8 MS. MURPHY-JOHNSON: OK. Let me see if there was  
9 anything else.

10 THE COURT: All right. Let them respond because I  
11 have some questions for them, and then I will let you respond.

12 MS. MURPHY-JOHNSON: Thank you very much, your Honor.

13 MR. SCHOEN: Your Honor, I'm David Schoen, and I  
14 represent the plaintiffs. I see the Court has read the papers  
15 thoroughly, so I don't intend to just reiterate what's in the  
16 papers. I'd actually like to start at a different place than I  
17 intended originally, just to respond to a couple of things that  
18 were said, and maybe the lead line is, quite frankly, a comment  
19 the Court made. This applied to Section 1367, the choice of  
20 law argument. The Court said -- I'm paraphrasing -- it  
21 understands this argument in the abstract but does not  
22 understand how it applies in this case. That's it in a  
23 nutshell.

24 That's exactly, with all due respect, what happened  
25 here. A number of legal arguments were thrown against the wall

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1 to see which stick, but when you break it down to this case,  
2 none of them applies to this case. We don't get, for example,  
3 to the choice of law issue and these so-called complicated  
4 questions of now we hear Palestinian law or Israeli law because  
5 they've never shown there was a conflict between New York law  
6 and those laws. In fact, the Court well versed in these issues  
7 commented in the *Licci* case that the Court is familiar with  
8 Israeli law, and when it comes to these kinds of things, there  
9 really isn't any difference.

10 But I heard some things today in the argument that,  
11 quite frankly -- and, again, I mean it with all due respect --  
12 I was quite surprised to hear. For example, we heard from  
13 Ms. Ferguson today the rather shocking proposition which turns  
14 everything on its head that if the -- I'm paraphrasing again --  
15 the fact that the question of whether the PA is an  
16 unincorporated association is too difficult to really determine  
17 should argue against hearing these claims, should make you  
18 dismiss these claims and send it away because we can't tell if  
19 it's an unincorporated association.

20 The defendants have missed their burden here  
21 completely and missed the appreciation of their burden in all  
22 regards.

23 Again, as the Court noted, we can't appear before this  
24 court and say, well, one argument didn't work; therefore, maybe  
25 this one will work, and then flowing from that should be the

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1 prejudice to these plaintiffs because contrary -- and I know  
2 she believed it when she said it -- but contrary to what  
3 Ms. Murphy-Johnson said, we don't say these claims can be  
4 brought in Israeli court today. We say that's part of the  
5 extreme prejudice that's happened in this case because they  
6 waited so late to raise these things, the statute of  
7 limitations has run in the Israeli courts, and we submitted an  
8 affidavit from this Jeremy Stern to that effect.

9 THE COURT: Let me start you with the basic premise  
10 that I started them with. Is it your position that they are or  
11 are not an unincorporated association?

12 MR. SCHOEN: It is my position that they are not, and  
13 it's my position primarily that they have the burden of  
14 establishing that they are, and on this record they certainly  
15 have not done that.

16 THE COURT: Well, I'm in the same position with you as  
17 I am with them is that your position is inconsistent and  
18 inconsistent -- understandably inconsistent because it is one  
19 way depending on what's to your advantage. Now, the position  
20 has always been consistently for service purposes and for other  
21 purposes that they're an unincorporated association.

22 They argue, and I don't think you directly addressed  
23 the issue -- they argued that you served them on that basis,  
24 OK? And that's the way you proceeded on that basis, and,  
25 therefore, you would like to consistently cite every court's



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1 ruling that they're an unincorporated association for the  
2 purpose of service; but then when it's to be applied to the  
3 causes of action, now you want to say, oh, they can't prove  
4 that. Well, what do you claim is their status?

5 MR. SCHOEN: Respectfully, your Honor, let me explain  
6 why I believe there is no inconsistency.

7 We've taken the position that they are not a  
8 governmental entity entitled to sovereign immunity, but that,  
9 as the Court said earlier, doesn't lead to the conclusion that  
10 for purposes of New York law they are an unincorporated  
11 association with members, therefore, not subject to suing or  
12 being sued.

13 And, with all due respect, the argument on service  
14 that the defendants have raised is simply wrong. We didn't  
15 serve them or assert that we served them as an unincorporated  
16 association. Under Rule 4(h) that's the catchall for  
17 organizations. Frankly, the argument works in our favor. Why?  
18 Because Rule 4(h) says it applies to organizations or  
19 associations subject to suit under a common name. They have  
20 never challenged that part of it. If they're subject to suit  
21 under a common name, that tears asunder their argument that  
22 they're not an entity operating under a common name. Their  
23 argument is we need to -- when you're talking about an  
24 unincorporated association, it's just a loose conglomeration of  
25 members and, therefore, you need to get the approval or

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1 ratification of every member. Well, if there is anything to be  
2 drawn from Rule 4(h) it is that it authorizes service for an  
3 organization or association subject to suit under common name.

4 Again, let me get to a little more basic question.  
5 The defendant said, well, it's complicated. We're not sure  
6 what to look at. Maybe we should look at Palestinian law.  
7 We're not sure what to look at about whether they could sue or  
8 be sued because it's complicated.

9 Well, how about a basic created document, the Oslo  
10 Accords that created the PA and that the PLO negotiated with  
11 the United States. It could not say more expressly that the PA  
12 is an entity authorized with the power to sue or be sued.  
13 Again, I don't think you could have it both ways.

14 What are they trying to do? They're trying to say in  
15 New York they don't have the right to sue or be sued because  
16 it's an unincorporated association. Well, I would suggest to  
17 the Court, with all due respect to the defendants, that the  
18 fact that it is this quasi-governmental entity, which is what  
19 they argued in the *Knox* case and how the court in *Knox* treated  
20 them. I can give the page cites for that. It's 306 F.Supp.2d  
21 424 to 435. Either they're that or they're this other kind of  
22 organization. Well, that's exactly why the Court in cases like  
23 the *Massachusetts Trust* case that we cited and other cases in  
24 the reply, that's exactly why the Court said if they don't  
25 really fit into what we call an unincorporated association with

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1 the members, and, after all, it's the membership that makes it  
2 where you can't sue them. You have to show approval by the  
3 individual members because it's such a loosey-goosey  
4 organization, but in the *Massachusetts* case, we say we look  
5 then how were they treated back home? And back home that  
6 organization that they argued was an unincorporated  
7 association, had the power to sue and be sued.

8 They said, wait a minute now. That's going to be  
9 unfair if we go to Massachusetts, and so we're not going to  
10 treat them like an unincorporated association here. Whatever  
11 they're called -- again, we have to analyze it under New York  
12 law specifically.

13 THE COURT: But every court that has opined on this  
14 issue for any purpose relating to any legal question, has  
15 determined that they qualified as an unincorporated  
16 association. What authority are you citing to me that would  
17 give you a basis to argue in law or in fact that that is not  
18 the case?

19 MR. SCHOEN: I'm telling the Court, respectfully, that  
20 none of those courts has analyzed the question in this  
21 framework. It says it in *Parsons*. The decision they  
22 submitted. It says the defendants haven't shown us any reason  
23 otherwise. It wasn't analyzed or argued.

24 THE COURT: It wasn't analyzed or argued, but that  
25 status was applied to them in all of those cases to both the

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1 advantage and disadvantage of both sides.

2 MR. SCHOEN: I'm saying, your Honor, I know that this  
3 Court is fully capable of analyzing the question on its own,  
4 and it has been presented and framed here. Again, the burden  
5 is on them. They have shown no membership. Who are the  
6 members of the PA? Who are the members of the PLO? And,  
7 again, respectfully, we do not concede that for purposes of New  
8 York law and this question under New York law that the PLO is  
9 an unincorporated association. There's reference made to it as  
10 an unincorporated association on page 17 of our papers, but  
11 then if you go to page 18, we say they haven't shown they have  
12 any members. So, while it might be called unincorporated  
13 association for some purposes, under New York law they've got  
14 to show they've got members and so on. And, frankly, if you  
15 had to show -- if we had discovery on the case, and they said,  
16 well, what would they determine in discovery? I suppose we  
17 have a laundry list, starting with their charter and the right  
18 to sue and be sued. How do they operate? Who are their  
19 members, and all that?

20 Frankly, if their members are what they said in their  
21 United States Supreme Court brief that the PLO is an umbrella  
22 organization of different factions, well, frankly, every one of  
23 those factions has a charter that would condone, ratify or  
24 approve this kind of terrorism that occurred in this case.

25 THE COURT: Well, my direct question to you is the

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1 same as to them: Is it your position that they are or are not  
2 an unincorporated association?

3 MR. SCHOEN: It is my position that as that term is  
4 used in New York law for these purposes, they are not. They  
5 are something like a quasi-governmental entity as the Court  
6 treated them in *Knox* in analyzing the question. They are  
7 not -- we have seen no proof on this record that they are a  
8 voluntary membership organization any more than any  
9 administrating authority, whether it's the Port Authority here  
10 or a governmental authority like a county government, is a  
11 voluntary membership organization. Its constituents, it has  
12 said, are all the factions of the Palestinian people. That  
13 doesn't sound or look like a voluntary membership organization.  
14 If they have the proof, they haven't made that proof.

15 But all of it, again -- by the way, I just wanted to  
16 take one or two baby steps back. That is, I know the Court is  
17 aware that we also have pending motions to strike these  
18 affirmative defenses on procedural grounds, and specifically  
19 with this issue, a waiver issue, because this issue was raised  
20 a long time ago in a subject matter jurisdiction motion which  
21 was denied, and then didn't appear again in the next series of  
22 motions to dismiss that we saw, and it's coming up now. That's  
23 relevant both for waiver and for the exercise of this Court's  
24 discretion because one of the many important factors for this  
25 Court to consider is the prejudice that arose from the way in

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1 which the defendants have engaged in their litigation of this  
2 case specifically with respect to that issue, and that means  
3 throwing these folks out of Court and throwing these claims out  
4 of court; not just for the plaintiffs who are non-Americans,  
5 but for the American plaintiffs that wouldn't be able to have  
6 the benefit of these kinds of claims which have different  
7 elements from the ATA.

8 THE COURT: Well, that may go to your argument of  
9 whether or not they should be allowed to dismiss those claims  
10 on this basis at this time, but the plaintiff was put on notice  
11 that they had an affirmative defense.

12 MR. SCHOEN: In the answer, your Honor?

13 THE COURT: Yes.

14 MR. SCHOEN: Yes, your Honor.

15 THE COURT: So, there is no prejudice in the sense of  
16 surprise that at some point during this litigation they were  
17 intending to put forth that affirmative defense.

18 MR. SCHOEN: Your Honor, is distinguishing between  
19 surprise and prejudice because that answer was filed after the  
20 statute limitations would have run in the Israeli courts, so we  
21 didn't have another forum to go to.

22 THE COURT: But I can't fault them for that aspect of  
23 it, as long as their answer was timely filed, whether or not it  
24 was timely filed in relationship to the statute of limitations  
25 some place else is not their fault. They get to timely file an

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1 answer, and they get to assert affirmative defenses that they  
2 say they're going to rely upon in defending this lawsuit. So,  
3 it may be prejudice to the plaintiff, but it's not undue  
4 prejudice.

5 MR. SCHOEN: I follow your Honor. My suggestion was  
6 that the waiver argument arises because there were motions to  
7 dismiss -- and this issue had been discussed -- and there were  
8 motions to dismiss before the answer was filed, and this wasn't  
9 raised in those, and we say they abandoned it by not raising  
10 it.

11 THE COURT: That may be a waiver of the motion to  
12 dismiss. It is not a waiver of the affirmative defense.

13 MR. SCHOEN: But I think it puts us in the position of  
14 assuming that issue isn't going to be in the case any more  
15 until it arises again in the answer years later. That is, if  
16 we have to evaluate at some point on our own, well, could it be  
17 that they are going to argue lack of capacity down the road,  
18 therefore, we have to cover our bases and file in Israeli  
19 courts in case somehow a court dismisses these things down the  
20 road. No reason to believe that until the answer is filed.  
21 When they filed other motions to dismiss when this subject the  
22 lack of capacity had been raised earlier, that motion was  
23 denied in the context of subject matter jurisdiction motion --  
24 sorry -- had been denied and then subsequent motions to dismiss  
25 are filed, it's not raised again. I'm just saying in terms

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1 of --

2 THE COURT: But that's what I'm saying, I want to  
3 understand your argument. I understand that argument to be a  
4 waiver of a subsequent motion to dismiss for lack of capacity.

5 MR. SCHOEN: I follow you, your Honor. Your Honor is  
6 being very precise.

7 THE COURT: It is not a waiver of an affirmative  
8 defense because they have not yet filed an answer asserting  
9 affirmative defense, and as long as they still have the right  
10 to file an answer asserting their affirmative defenses, it  
11 doesn't automatically -- as related to your other motion  
12 automatically say I'm supposed to strike their affirmative  
13 defense because they didn't make it in a motion to dismiss.

14 MR. SCHOEN: Your Honor is being very precise and  
15 absolutely correct, I believe.

16 However, that brings us to the other argument again  
17 about how they raised it in the answer. As your Honor is also  
18 aware, we have raised this argument, and under Rule 9 they fail  
19 to allege it with particularity and with the supporting facts  
20 that are required. We cite the cases in the brief that require  
21 that kind of allegation. We can't just throw out there lack of  
22 capacity.

23 I know I've skipped all around. I would like to just  
24 kind of put in a nutshell a little bit the first argument and  
25 just reiterate what our arguments are on this unincorporated



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1 association, and then I would like to just put in a nutshell  
2 our 1367 arguments, and then I would like three minutes to  
3 discuss with the Court why in all of this, and especially in  
4 the exercise of the Court's discretion, it makes absolutely no  
5 sense to dismiss these cases for any of the prudential reasons  
6 that courts sometimes dismiss what I, in the old days, called  
7 pendent supplemental jurisdiction to dismiss those kinds of  
8 cases in this case.

9 On the unincorporated association, as I say,  
10 fundamental position after we get past the waiver and all  
11 that -- and that would be one way to decide it is on waiver --  
12 is that the burden is on them because they're looking here for  
13 an escape for these claims in this case. They have the burden  
14 of proving that they are an unincorporated association under  
15 New York law. And that doesn't end it. It's a matter of  
16 capacity, even if they are an unincorporated association that  
17 they don't have the capacity to sue or be sued. That's  
18 relevant here because they are this unique sort of animal,  
19 let's call it -- unique sort of entity, both the PA and the  
20 PLO.

21 So, again, I say with respect to the PA, you look to  
22 the organic document that created them. It says expressly,  
23 which the PLO negotiated for, we have the right to sue and be  
24 sued. Again, we don't have to guess because we pulled a series  
25 -- doing discovery on our own, we pulled a series of about 10

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1 to 14 case necessary which the PA has sued. They're the  
2 plaintiff in 10 to 14 cases at least. That was just in one  
3 glance in the Israeli court. So they recognize they have the  
4 right to sue and be sued.

5 So what we say in this argument is when you're dealing  
6 with, even if it's an unincorporated association --

7 THE COURT: Slower.

8 MR. SCHOEN: I'm sorry. If it's a foreign  
9 unincorporated association -- and by foreign, I just mean a  
10 non-New York unincorporated association -- we have to look to  
11 how that entity is treated back in its domicile. Those are the  
12 cases we've cited that they take issue with, and we cite it  
13 again in the reply later on. I can give the Court the cites to  
14 pleadings and all that, but, again, I can see the Court has  
15 read them all. So that is an answer to that.

16 The 4(h) argument we've discussed. The only reason I  
17 raise it is because they've tried to claim mileage out of that  
18 saying well, they served it under 4(h) as an unincorporated  
19 association. That's the catchall for organizations. Again, it  
20 undercuts their argument because it only applies to groups that  
21 can be sued under a common name. Their position is we can't be  
22 sued under a common name. You got to name our president or  
23 treasurer and then prove all the members approved it or  
24 ratified it. That's a different kind of entity.

25 I think that pretty well covers it. Again, they have

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1 the burden of showing what it is and of establishing that they  
2 are members, or, as the Court alluded to, or suggested -- I  
3 don't see that the Court came to any conclusion -- as the Court  
4 threw out as an issue, isn't it fundamentally a question of  
5 fact? If it's a question of fact, then we have no business  
6 deciding it at this point. Certainly nobody has been  
7 prejudiced and nobody would be prejudiced by having it go  
8 forward all the way through.

9 In fact, two of the five plaintiffs, who they claim  
10 shouldn't have any claims here on their demand, on the  
11 defendant's demand, have flown over to New York, have had their  
12 depositions taken on damages, and have had Rule 35 examinations  
13 taken already at great expense and great inconvenience to them.

14 On the Section 1367 argument, your Honor, first of  
15 all, again, we don't even get there. There has been no showing  
16 of any conflict of laws in the first place. Why is that  
17 important? Because they rely on two prongs: They rely on the  
18 prong that you have the discretion to get rid of these claims  
19 if it raises a novel issue, that sort of thing.

20 Let me just read from 1367, your Honor.

21 Their claim is that "this case raises a novel or  
22 complex issue of state law" -- you know, some jurisdiction  
23 other than the federal court -- "and that the claim or  
24 Subsection 2" -- I'm reading from 28 U.S.C. 1367(c)(1) and (2).

25 The first one says "it raises a novel or complex issue

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1 of state law." The second one is "these claims substantially  
2 predominate over the claim or claims over which the district  
3 court has jurisdiction" -- the ATA claims.

4 "The last proposition, cannot be supported under any  
5 reasonable good faith argument that these garden-variety claims  
6 of wrongful death and assault and battery would predominate  
7 over this thing."

8 What they mean is, well, we would have to apply  
9 foreign law for them, and they would predominate because we'd  
10 all get bogged down, as Ms. Murphy-Johnson said, in having  
11 experts in here for two or three years with foreign law and all  
12 that. Nonsense. I don't mean that disrespectfully, but it's a  
13 nonsensical argument because we don't get to the first part.

14 First of all, case law ad infinitum, and the  
15 commentators all say, as the Court said earlier, when we're  
16 dealing with torts, contract claims, and that sort of thing,  
17 these are not the kind of novel or complex issues that are  
18 contemplated by Section 1367(c). That's right out of Wright &  
19 Miller and cases that they cite.

20 On the second part of it, will they predominate, this  
21 is the classic case in which the state court claims are  
22 intertwined -- inextricably intertwined with the federal claim.  
23 The proof is the same. The evidence is the same. You go  
24 through one trial with no difference except maybe the elements  
25 are more simple than in the ATA.

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1 But, again, let's talk about the burden. The first  
2 burden is on them to prove that there is a conflict between New  
3 York law and Israeli law or Palestinian law. And to say to the  
4 Court today, well, now we don't know what law would apply in  
5 Palestinian territories -- they are the law. They're the  
6 legislature there. They are the courts there. They have the  
7 burden to tell the Court. It can't just be let's throw it  
8 against the wall, and in the abstract we could have an issue  
9 here, and it could be real complicated, maybe Judge. Can't  
10 tell you why. Can't tell you how. Can't tell you what the  
11 differences are or what that body of law is, but, you know, in  
12 the abstract, that could be out there; therefore, Judge, why  
13 don't you just get rid of these things and makes things simple?  
14 That's not the way it works, the Court knows that, and it's not  
15 fair.

16 Another relevant question: Would it enlarge the scope  
17 of the action at all? Not at all. Not at all. Let me  
18 explain. I think the best way for me to explain what I mean by  
19 that, it will take me about three minutes because I want to  
20 concretize it and put it in real terms. I want to tell the  
21 Court who the five plaintiffs are that we're talking about and  
22 how their claims arise to perfectly, I believe -- not me -- the  
23 facts perfectly demonstrate the point I'm trying to make here;  
24 both why it wouldn't complicate the case at all and why it's  
25 perfectly appropriate for these claims to be in this case. In

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1 fact, this is the classic case.

2 The first plaintiff -- we're talking, again, about  
3 five plaintiffs on these claims. The first plaintiff is  
4 Guetta. In January of 2001, just outside Jerusalem, four men  
5 with Kalashnikov machine guns opened fire on a car in which  
6 Varda Guetta was traveling with a 14 year-old son Oz. The  
7 shooters got out of their car and they fired at the Guettas'  
8 car just a few feet away. Varda got a close look at some of  
9 them. We intend to prove in this case that those men were  
10 officers with the PA Police Department Security Forces. Many  
11 of them are now sitting in jail for carrying out similar  
12 attacks in that same area. The son, Oz, was struck with  
13 machine gun bullets and has serious injuries. He is an  
14 American citizen and has an ATA claim. Somehow, miraculously,  
15 the bullets missed Varda, but she has significant mental health  
16 issues, as they know from depositions, and, as a result, she  
17 has a physically and emotionally crippled son. And she deals  
18 with that every single day.

19 It would be unfair in the extreme to deny Varda the  
20 opportunity to present her claims from this same incident in  
21 which the claims for her son's injuries are going to be  
22 presented. She has claims for the emotional distress. She has  
23 claims for the loss of consortium, the loss of her mother/son  
24 relationship as it was over the last ten years. So it doesn't  
25 add to the scope of this case because the evidence will be the

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1 same. The evidence will be that she was there and what she  
2 suffered. So, yes, if we have to put on some damages evidence  
3 about her, that can increase it a little bit. That's not the  
4 kind of thing we talk about in why we have to get rid of these  
5 claims because they would predominate.

6 I'll make it real quick on the others. In the Bauer  
7 incident we allege in March 2002, a suicide bomb blew up on  
8 King George Street in downtown Jerusalem. Dr. Alan Bauer and  
9 his young son, Yehonathon, were injured severely and several  
10 Israelis were killed. Again, two officers in the PA Security  
11 Services, Abdel Akrim Aweis and Nasser Shawish were convicted  
12 of planning the attack and sending the bomber. They proudly  
13 admitted it. This is one of those cases in which General Zinni  
14 handed the PA a list of known terrorists, people who were  
15 committing these acts. They locked up Aweis for about a week  
16 or two and then released him. They knew who he was; they knew  
17 what he was going to do.

18 The story gets even worse. Let me cut to the chase  
19 here. Alan Bauer and his son, Yehonathon, are Americans. They  
20 had ATA claims. But Revital Bauer, who is Alan's wife and  
21 Yehonathon's mother, is not American. She only has the  
22 non-federal claims. So, again, she'd be out of court, but  
23 there's no reason for her to be because this case is going to  
24 be tried here and now with all of the same evidence at trial.

25 Goldberg is the third case. January 2004, a PA

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1 policeman Ali Jara got into the number 19 bus in Jerusalem.  
2 The attack was planned, we allege, and we will prove, by two  
3 other PA policeman, Achmed Salah and Halmi Hamash, who were  
4 convicted and got multiple sentences for it. Among those  
5 murdered in the bombing was Stuart Scott Goldberg. He was  
6 Canadian. So his estate doesn't have an ATA claim, but his  
7 wife and seven minor children, who are American, do. They have  
8 their ATA claims here, and they will be litigating it. So what  
9 an absurd result to throw the estate of the fellow who was  
10 murdered out while the relatives will be in here and have the  
11 right to be in here.

12 Finally, there's the Mandelkorn case, which are two of  
13 the plaintiffs. There in June 2002 a suicide bomber blew up in  
14 a crowded bus stop in Jerusalem, killing a group of Israelis  
15 and wounding plaintiff Shaul Mandelkorn. He's not American,  
16 but his father, Rabbi Leonard Mandelkorn, is American, and,  
17 therefore, the father has a claim under the ATA; but since  
18 Shaul is not American, he doesn't have a claim, nor does his  
19 mother under the ATA. But, again, you'll have the father going  
20 forward here, all of the facts of that incident, that terrible  
21 terrorist incident will be put before the Court and jury in  
22 this case in all their detail whether or not those plaintiffs  
23 are here. Those plaintiffs deserve an opportunity to have  
24 their case heard.

25 In terms of the depositions, as I say, Revital Bauer,



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1 the wife, the husband of Alan and the mother of Yehonathon, was  
2 deposed already, and she's already had her Rule 35 examination  
3 done.

4 Varda Guetta was deposed already June 28. She had her  
5 mental examination June 27 at their demand. And they already  
6 have demands out there for immediately taking the depositions  
7 and Rule 35 examinations of the other plaintiffs. Well, then  
8 they should do it because these claims ought to go forward,  
9 your Honor.

10 I hate to even throw this out here because, again, I  
11 don't think we get off first base with these claims, but if we  
12 did, then we ought to be able to amend the complaint at this  
13 point and name the president and the treasurer of the  
14 association and prove to the Court then that the kinds of -- we  
15 don't know who their members are, but if they claim the members  
16 are these factions, that each one of those factions has a  
17 charter and a policy and a practice of engaging, approving and  
18 ratifying these kinds of terrorist acts, so that we would get  
19 them that way also.

20 The bottom line is the estate claims ought to go  
21 forward for all the reasons we've said, your Honor. I  
22 appreciate the time. I know the Court has read the papers. We  
23 also rely on the papers. And I don't mean to undercut anything  
24 in the papers that I've said here today.

25 THE COURT: Let me ask you a side question with regard

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1 to your Count Six. Why is that an independent count?

2 MR. SCHOEN: Your Honor, it could well be a misnomer  
3 considering it to be a cause of action. This is a solatium and  
4 consortium count. The fact of the matter is, under the ATA we  
5 have the right to those kinds of damages.

6 THE COURT: Damages.

7 MR. SCHOEN: Yes, your Honor.

8 THE COURT: That's a determination of damages. That's  
9 not, as I understand it, an independent cause of action. You  
10 say that you want to allege it as a separate non-federal cause  
11 of action. The fact that it may be related to damages in a  
12 federal cause of action doesn't make it independently a cause  
13 of action unless there is such a cause of action in Israeli law  
14 or in New York law, and I fail to find it.

15 MR. SCHOEN: Let me say this, your Honor ---

16 THE COURT: I assume you put it in that category of  
17 other of common law or non-federal claims, but --

18 MR. SCHOEN: Because we believe those kinds of damages  
19 are also recoverable under the state.

20 THE COURT: That is what you said, let me go to --

21 MR. SCHOEN: The Court's point is, it's not a separate  
22 cause of action. I have been in the case two days, and I think  
23 that's right, and the Court knows it far better than I do, and  
24 the Court has been in the case a lot longer.

25 THE COURT: You've talked about garden-variety

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1 non-federal causes of action, such as wrongful deaths, loss of  
2 consortium and solatium, assault and battery, negligence and  
3 infliction of emotional distress. Then you talk about the five  
4 remaining counts: Conscious pain and suffering, civil  
5 conspiracy, aiding and abetting, vicarious liability and  
6 respondeat superior and inducement. They set forth theories of  
7 liability and/or types of damages available, not separate  
8 causes of action.

9 It seems to me that Count Six falls in that category,  
10 not the first category.

11 MR. SCHOEN: I can't disagree, your Honor.

12 THE COURT: OK.

13 MR. SCHOEN: I hesitate to speak for lawyers who have  
14 done ten years of work in the case and I'm in it two days, but  
15 that's the way I read it.

16 THE COURT: That's not determinative of this case.

17 Let me just go back to one other issue with regard to  
18 your motion to strike.

19 MR. SCHOEN: Yes, your Honor.

20 THE COURT: Let me put aside for a second the lack of  
21 capacity in the affirmative defense. What is the utility or  
22 purpose of striking all of the affirmative defenses at this  
23 point or striking anything at this point? I understand the  
24 difference between a motion to dismiss and a motion to strike.  
25 Why am I striking?

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1 MR. SCHOEN: Again, your Honor, I think part of this  
2 is -- I will tell you how I read it, your Honor. I have a  
3 little bit of my own baggage in this one. The judge I happened  
4 to clerk for was real big on this sort of stuff. That is, he  
5 would call up the parties at the time and say, listen, you've  
6 thrown this in your answer, I don't want this all -- we're  
7 going to have a have a trial on that. Let's just clean it up.  
8 I think part of that is what this is. For example, one of the  
9 objections in the motion to strike is that the defenses are  
10 just too conclusory. Then we break it down.

11 But as to affirmative defenses three and six, we say  
12 these allege personal jurisdiction and improper venue, those  
13 have already been ruled on. No reason for them to be in the  
14 answer. They were dismissed on a motion.

15 THE COURT: So I ignore them.

16 MR. SCHOEN: OK.

17 THE COURT: As I say, it's just a matter of style.  
18 You're right. Your judge may have stricken them. I don't even  
19 want to spend the time having to argue about striking them. I  
20 will just ignore them. If those issues have been resolved,  
21 they've been resolved. Every time I dismiss something out of a  
22 case, I don't need to go back and rewrite the pleadings. It's  
23 not there. My attitude is that if they have alleged  
24 sufficiently and put you on notice of any claim, counterclaims,  
25 or affirmative defenses, the only question in my mind for me to

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1 address is whether or not at the end of discovery there is a  
2 basis in which to put forth those affirmative defenses in  
3 support of a summary judgment motion or to go to a jury with  
4 those affirmative defenses.

5 MR. SCHOEN: I understand, your Honor. I think  
6 another issue, just as a matter of law, was plaintiffs take the  
7 position that *Twombly* and *Iqbal* apply to affirmative defenses,  
8 and we cite a whole host of cases that say that, and say if  
9 they can't support these things, they ought to go out --

10 THE COURT: Which affirmative defense don't you  
11 understand that they are asserting and why they are asserting  
12 them?

13 MR. SCHOEN: I think we understand them.

14 THE COURT: So, what else does *Iqbal* and *Twombly*  
15 require other than sufficient specificity for you to understand  
16 the nature of the affirmative defense so that you can confront  
17 that affirmative defense?

18 MR. SCHOEN: I think specifically, for example, for  
19 the fourth defense of lack of capacity, this dovetails with  
20 that argument under Rule 9, and, that is, they have the burden  
21 of setting out the facts that they know about that make them  
22 this unincorporated association.

23 THE COURT: They don't have to prove it in their  
24 answer. They just have to give you notice of what they claim  
25 is the nature of the affirmative defense. It seems to me that

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1 when anyone reads from the plaintiff's side that they were  
2 asserting a lack of capacity, that the only reasonable  
3 conclusion to reach at that point was that they were asserting  
4 a lack of capacity based on the fact that they are not an  
5 unincorporated association.

6 MR. SCHOEN: I hear the Court. I would just say that  
7 I think the rules require them to also set out the facts that  
8 support it, and, remember, we have this problem with their  
9 26(a) disclosures.

10 THE COURT: Well, that's a different question.

11 MR. SCHOEN: That's right.

12 THE COURT: You could have enforced the 26(a)  
13 disclosures or moved on the basis that the disclosures are  
14 insufficient, but that doesn't go to the pleadings. The  
15 disclosure doesn't go to the pleadings. It goes to whether or  
16 not they made sufficient disclosures.

17 MR. SCHOEN: Yes, your Honor. That's raised in our  
18 cross motion, of course. The disclosures were insufficient,  
19 and that that's relevant to this issue as well.

20 THE COURT: Well, the disclosures may be insufficient  
21 and may warrant preclusion of certain evidence that wasn't  
22 disclosed, but I'm not sure how that independently factors into  
23 my evaluation as to whether the pleadings are sufficient. I  
24 assume that you would say I should reject their argument that  
25 your disclosures were insufficient, so, therefore, you fail to

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1 state a cause of action in your complaint. Those aren't  
2 related to each other. Those are two different legal analyses.

3 MR. SCHOEN: I hear you, Judge.

4 THE COURT: So, at this point, as I say, my reaction  
5 is for the purpose of cleaning up the pleadings, if I spend  
6 most of my time trying to do that in cases, I'd be spending a  
7 lot more time doing that than concentrating on the merits of  
8 the case. With regard to any affirmative defense, I'm not sure  
9 that you have articulated which affirmative defense -- I  
10 understand your arguments about what issues have already been  
11 addressed, and that they're no longer in this case; but with  
12 regard to an argument as to any particular affirmative defense,  
13 I'm not sure which affirmative defense that you say is  
14 inadequately pled on the basis that it is not pled in a manner  
15 in which you sufficiently understand what is the nature of the  
16 affirmative defense that they intend to pursue in order to  
17 defeat liability.

18 MR. SCHOEN: I understand, your Honor.

19 THE COURT: So, is it your position that -- when you  
20 say the underlying facts, I assume it's not your position that  
21 even with regard to capacity, if they said that we assert the  
22 affirmative defense of lack of capacity because we are an  
23 unincorporated association, and, therefore, cannot be sued, you  
24 wouldn't argue that some other factual allegation of proof  
25 would be necessary beyond that.

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1 MR. SCHOEN: Under Rule 9, I would, your Honor.

2 THE COURT: What else would you say would be -- they  
3 would have to give you the proof on that?

4 MR. SCHOEN: They have to make the assertion with  
5 their defense, and that facts are peculiarly within their  
6 knowledge.

7 THE COURT: But what facts are peculiarly within their  
8 knowledge? If they simply said, we have the affirmative  
9 defense, and they didn't articulate this, but I think you  
10 understood this to be their position. So if they had  
11 specifically articulated in the affirmative defense, that we  
12 have the affirmative defense of lack of capacity to be sued  
13 because we have been determined to be and we are in fact an  
14 unincorporated association which cannot be sued under New York  
15 law for these non-federal claims, you are not saying that they  
16 would have to lay out in attached chapter and verse what  
17 created them and who their members are and how they're an  
18 unincorporated association, as long as they put you on -- this  
19 is notice to you. Even in terms of affirmative defenses, that  
20 is clearly a plausible theory under *Twombly* and *Iqbal*, and it's  
21 clearly sufficient to put you on notice that they claim to  
22 establish as a defense to any cause of action that you might  
23 otherwise establish that you have sued an entity which cannot  
24 be sued. I'm not quite sure what else you say that they would  
25 be required to put in a plea.



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1 MR. SCHOEN: Your Honor, I refer the Court to DE 196  
2 at page 9. We just kind of set out sort of the body of case  
3 law starting with *the Pressman v. Estate of Steinvorth* case.  
4 What they say in there in fleshing this out, what do we mean by  
5 Rule 9(a) and what's a waiver? They say: He waived the  
6 capacity defense by waiting more than seven years before  
7 raising it. That's not what your Honor is talking about right  
8 now.

9 THE COURT: But they're not even raising a waiver  
10 argument in that regard. You're raising an insufficient  
11 pleading argument.

12 MR. SCHOEN: In this argument, of course, the Court's  
13 aware we are waiving the waiver argument but they waited so  
14 long -- they raised it first and then they, we say abandoned  
15 it, and then raised it again. That's what happened in  
16 *Pressman*.

17 THE COURT: Slow down. Slow down for a second.

18 I understood your waiver argument and the failure to  
19 sufficient plead the affirmative defense argument to be two  
20 separate arguments. Is that not two separate arguments?

21 MR. SCHOEN: Two separate arguments. The only reason  
22 I raise it now is because in *Pressman*, they put it in that  
23 context.

24 THE COURT: Right, in the waiver context.

25 MR. SCHOEN: Not just the waiver -- I'm sorry, your

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1 Honor. They say because he failed to be more explicit in his  
2 answer, he has waived it. So it's a waiver because he didn't  
3 properly or timely raise it. That's an argument we have. And  
4 in this context, the way they call it in *Pressman* is they call  
5 it a waiver by not explicitly laying out supporting facts.  
6 Rule 9(a) requires not only pleader to make a specific negative  
7 averment of the plaintiff's capacity to sue, but also that  
8 averment to include "such supporting particulars as are  
9 peculiarly within the pleader's knowledge."

10 In this case, they only asserted that we lacked the  
11 requisite standing to bring the case, but they didn't give any  
12 particulars or explanation, the Court said, and the Southern  
13 District here, the Court said, and, therefore, they waived the  
14 issue for not being specifically -- for not laying out the  
15 supporting facts. In this case, I would say who the members  
16 are, what makes them an unincorporated association, because it  
17 gives us notice then.

18 THE COURT: On what point do you say they waived this  
19 because at some point you knew this, so they didn't.

20 MR. SCHOEN: I still don't know why they claim they're  
21 an unincorporated association.

22 THE COURT: And you say because you don't know at this  
23 point why they claim that they're an unincorporated  
24 association, that they have waived that argument?

25 MR. SCHOEN: Yes, your Honor. And I don't believe

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1 they are a membership organization, as we know that to be  
2 required under unincorporated association. If they are, I  
3 don't know who their members are, and I say -- they do know.  
4 If they are going to take the position --

5 THE COURT: But you do know it to one extent. You  
6 know it to the extent that they have been determined to be an  
7 unincorporated association in other cases, so you are at  
8 least -- to sort of say it is somehow a surprise to you that  
9 somebody would say this and why they would say that is a little  
10 bit --as I said, that's why I say it sounds to me you are  
11 making solely a waiver argument. You are not making anything  
12 other than a waiver argument.

13 (Continued on next page)

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argument

1 MR. SCHOEN: It's a waiver and an insufficiency  
2 argument under Rule --

3 THE COURT: Well, I'm not sure -- as I say, I'm not  
4 sure that it's a waiver of argument that they didn't put you on  
5 notice as to the nature of the affirmative defense so that you  
6 can obviously have an opportunity to either move to dismiss it  
7 or to explore any discovery. I don't understand that you were  
8 in such a position.

9 MR. SCHOEN: Well, we have said we needed discovery on  
10 that issue, of course before --

11 THE COURT: Right. So, if you get discovery on the  
12 issue then why is it waived?

13 MR. SCHOEN: I still think it is a violation of Rule  
14 9.

15 THE COURT: Have you requested discovery on that  
16 issue?

17 MR. SCHOEN: Yes, your Honor. We have discovery  
18 requests for cases in which they've sued and been sued.

19 THE COURT: Okay.

20 MR. SCHOEN: That sort of thing.

21 THE COURT: Are they somehow in default on responding  
22 to those outstanding requests?

23 MR. SCHOEN: I don't know the answer to that but  
24 they're asking your Honor to dismiss these claims and are  
25 saying we don't need any discovery.

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argument

1 THE COURT: No, but I'm not -- I'm not focusing on  
2 what they're asking me to do, I'm focusing on what you're  
3 asking me do. I mean, you are saying they have waived it even  
4 though you targeted a discovery request that is still  
5 outstanding, they have not defaulted on appropriately and  
6 timely responded to that discovery request. So why, under  
7 those circumstances, should I say that they have -- you're in a  
8 position to say that you don't understand the nature of their  
9 claim and that's sufficient for you to confront and disprove  
10 that affirmative defense?

11 MR. SCHOEN: Let me put it like this, your Honor.

12 THE COURT: Or explore that in discovery.

13 MR. SCHOEN: Let me put it like this, if may.

14 I think part of the reason for the rule is that  
15 requires this so that we are not just engaging in endless  
16 motion practice and briefing, let's flesh it out from the start  
17 so we know what we're talking about with the answer; not so  
18 that, your Honor, we can show up today after all of this  
19 motions practice and say -- I don't mean this in any way as a  
20 personal attack at all -- but I'm saying from the defendant's  
21 perspective, well, I guess we're an unincorporated association  
22 because we haven't been anything else so far.

23 THE COURT: But aren't you already in that position?  
24 If you weren't in that position you wouldn't have been in a  
25 position to articulate and generate the specific discovery

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argument

1 requests that you say were relevant to that issue. You have  
2 already done that. Why would a -- if you have already  
3 requested what you know is the relevant inquiry to defeat that  
4 affirmative defense or to argue that they produce no proof and  
5 so order that from the defendants, in what way should I say  
6 that?

7 MR. SCHOEN: If the Court's position is no harm, no  
8 foul, in a sense, I hear you. I think there is a foul because  
9 I think it cost us a great deal extra time and effort and money  
10 and so on having to deal with the issue without knowing --  
11 without them meeting their obligation because it is part of the  
12 same obligation carrying a burden of proof, that is, why are  
13 you an unincorporated association, who are your members, how do  
14 you establish those things. And in the answer there is a Rule  
15 98 for a reason. It distinguishes between lack of capacity and  
16 other kinds of other defenses and it says you have to give us  
17 the underlying facts.

18 Judge, are we finished?

19 THE COURT: Yes.

20 MR. SCHOEN: I mean you make it -- this is what a  
21 lawyer lives for, frankly, to have a Court this prepared when  
22 we come in here for argument.

23 THE COURT: I know. It is important for all parties.

24 MR. SCHOEN: I very much appreciate it.

25 THE COURT: I will let them respond.

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argument

1 MS. FERGUSON: You have me back again, your Honor.

2 THE COURT: Sure.

3 MS. FERGUSON: Just briefly on whether there was sort  
4 of a foul in the way in which the affirmative defense of lack  
5 of capacity was raised.

6 The PA and PLO fully briefed this issue back in 2007  
7 and the Court wanted to defer ruling on that question until the  
8 threshold of personal jurisdiction issue was resolved. That  
9 took some time to resolve and, meanwhile, we preserved our lack  
10 of capacity argument and then, of course, raised it in the  
11 answer so there has been no waiver, there has been no  
12 prejudice. The plaintiff has been on notice since 2007 not  
13 just that we intended to raise a lack of capacity defense but  
14 of the very nature of the argument and what it rested on  
15 because we actually briefed the issue in 2007. So, I wanted to  
16 make that point clear.

17 With respect to the lack of capacity argument, I think  
18 it has become somewhat muddled in terms of what the different  
19 kind of points of inquiry are and what law one looks to for  
20 these different points of inquiry, and I think it is very  
21 important to distinguish between the first question of: What  
22 kind of entity is this? Is it a corporation? Is it a state?  
23 Is it an unincorporated association versus if it is an  
24 unincorporated association what law do we look to determine  
25 whether it has the capacity to be sued? And my opposing

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argument

1 counsel has argued that well, sure, the PLO might be an  
2 unincorporated association in a general sense, but under New  
3 York Law it is not an unincorporated association. Well, New  
4 York Law does not govern the status of the PLO or the PA under  
5 the Federal Rules of Civil Procedure. That's become a question  
6 of federal common law, the what is it.

7 What the Federal Rules of Civil Procedure then tell  
8 you is that if the PLO is an unincorporated association, then  
9 you go to the law of the forum to determine its capacity to be  
10 sued.

11 There is also this question that sort of comes into  
12 play that creates some confusion about, well, who are its  
13 members and did its members ratify the unincorporated  
14 association's actions. Well, we don't even get to that point  
15 because if you accept the premise that the PA and the PLO are  
16 unincorporated associations and then you go to law of the  
17 forum, New York, it tells you that the unincorporated  
18 associations cannot be sued in their own name, they have to be  
19 sued in the name of the president or the treasurer. If the  
20 plaintiffs had done that, which they didn't, then there would  
21 be the question of whether they sufficiently alleged that the  
22 members had ratified the conduct. But we don't have that, the  
23 valid complaint even moves forward because it named the PA and  
24 PLO, not the president or treasurer and the plaintiffs, even  
25 though they have been on notice since 2007 that we have this



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argument

1 lack of capacity defense and the nature of that defense, they  
2 have not sought leave to amend. They haven't filed a complaint  
3 against the president or treasurer. So, the notion that we  
4 need discovery to determine every single member of the PLO or  
5 whether every single member of the PLO ratified this action,  
6 that's putting the cart way before the horse because they don't  
7 even have, under New York Law, a valid claim to proceed on  
8 because they've sued the wrong entity, or they've sued it in  
9 its own name, I should say. So, I wanted to clarify that point  
10 as well.

11 I also think, your Honor, that it would be a mistake  
12 to keep sort of kicking this can down the road with respect to  
13 these supplemental law claims by suggesting, well, maybe there  
14 is some other facts out there that would help us resolve this.  
15 These are, I acknowledge, sui generis organizations, the PA and  
16 the PLO, but I submit that the plaintiffs have not identified  
17 specific discovery that would help us to figure out how, under  
18 U.S. law, we are going to treat this sui generis thing that is  
19 the PA and PLO and we all sort of know in broad, general terms  
20 what they are. They want discovery on, well, I would like to  
21 see charters of every individual member of the organization to  
22 see if they've ratified it. Well, we don't get to that  
23 question. We don't get to that question because they haven't  
24 filed a suit against the president or treasurer. So, there is  
25 no reason to keep kicking this can down the road because there

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argument

1 isn't another avenue with respect to the capacity point.

2 With respect to the supplemental, our sort of  
3 additional argument under 1367, I understand your Honor's  
4 position that well, yes, it is complex here, but it would be  
5 complex against Israel as well and I think it is important to  
6 understand that we did raise this argument of lack of capacity  
7 back in 2007 when the statute of limitations had not run in  
8 Israel. Moreover, this is a highly -- I can't stress enough  
9 how difficult it is for the PA and the PLO to litigate complex  
10 cases in U.S. Courts and deal with the obligations of U.S.  
11 civil discovery. We have been in discovery for quite a time  
12 now, this case has been ongoing since 2004, active since 2007.  
13 We are getting -- we are getting very near the end of fact  
14 discovery. Fact discovery is set to close December 21st. And  
15 so, the PA is sort of getting there but now to open up this  
16 entire tranche of additional claims involving different sources  
17 of foreign law and requiring -- and where all the facts and the  
18 experts and the witnesses and the documents, everything is over  
19 there, so it is very expensive to litigate it here as opposed  
20 to in the region. It is very burdensome. The issues are  
21 considerable, considerable expense and delay, and it truly is  
22 already a complex case.

23 THE COURT: Well, the PLO and PA has been involved in  
24 numerous litigation in the United States in various courts.

25 MS. FERGUSON: Yes.

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argument

1 THE COURT: I don't know why this is any more  
2 burdensome than any other litigation that they must expect,  
3 particularly under the ATA, to be involved in. And, as I say,  
4 even I if I accept your argument, this case doesn't go away.

5 MS. FERGUSON: No, this case does not go away because  
6 under the statute, if a U.S. national has been injured, they  
7 have a right to bring suit here.

8 THE COURT: So, I can't give them a more convenient  
9 forum, I can only put them into forums which is less than  
10 convenient.

11 MS. FERGUSON: But, with respect to embarking on what  
12 would be a complicated, lengthy, burdensome process of expert  
13 discovery and litigation of numerous foreign law claims --

14 THE COURT: If you don't, give me a scenario where you  
15 won't have to do that anyway.

16 MS. FERGUSON: Well, they should have brought those  
17 claims in Israel.

18 THE COURT: The only argument that I can assume you  
19 are making is that if I grant your motion, since they are  
20 time-barred in Israel, you won't have to do that again in any  
21 other forum because they will have no forum to litigate these  
22 common law claims.

23 MS. FERGUSON: Even if Israel were to toll the statute  
24 and allow the claims to move forward.

25 THE COURT: Then you would have double work. I mean,

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argument

1 how does that --

2 MS. FERGUSON: Except the experts are likely to be in  
3 the region.

4 THE COURT: Okay.

5 MS. FERGUSON: We will have more access to people that  
6 speak those languages in the region.

7 THE COURT: Why is it that you don't have access to  
8 those people in the region even if you are litigating  
9 ultimately in a case here?

10 MS. FERGUSON: Well, the PA's U.S. counsel doesn't --  
11 we don't read Arabic or Hebrew.

12 THE COURT: That's not where it should be, that is who  
13 the lawyer should be. Get yourself some lawyers who speak  
14 Arabic or Hebrew because that is what is going to have to  
15 happen. That is not a compelling argument about the forum,  
16 that's a compelling argument about who is involved and what  
17 lawyers and support staff is involved in litigating.

18 MS. FERGUSON: Your Honor, there is a case in front of  
19 the Supreme Court right now, the Kiobel case involving the  
20 alien tort statute where the Court is inquiring as to under  
21 what circumstances should U.S. Courts exercise jurisdiction  
22 over claims involving foreign defendants, involving foreign  
23 plaintiffs and actions that occur abroad. Now, here there is a  
24 statute that says, yes, the U.S. Court will take it if the U.S.  
25 national has been injured but now that's become the vehicle for

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argument

1 attaching any number of other claims.

2 THE COURT: That arise out of those incidents.

3 MS. FERGUSON: Right, but that add even more -- that  
4 now have a U.S. Court not just adjudicating a federal statute  
5 but now you have the U.S. Court trying to decide whether under  
6 the law of the West Bank whether they actually recognize a  
7 claim for negligent infliction of emotional distress.

8 THE COURT: You keep saying that but I haven't  
9 confronted that in this case yet and I'm not sure on what  
10 scenario you say that this Court is going to have to confront  
11 that. That has not been an issue that's raised by either  
12 party, that somehow that we are going to be trying to decide  
13 whether or not the defendants are liable under some other law  
14 other than the law -- the ATA and the law that is consistent in  
15 both New York and Israel.

16 MS. FERGUSON: Well, that's where we keep going back  
17 to the Second Circuit case that says that the choice of law  
18 rules for torts would have the Court, as to conduct-regulating  
19 activity, apply the law where the conduct occurred. And some  
20 of the conduct here is alleged to have occurred in -- not in  
21 Israel but in the West Bank.

22 THE COURT: Well, that issue, in all of these years,  
23 has not been raised in this Court, so now you say that you  
24 anticipate that that's what you may raise in the future and  
25 make those arguments. There is only a limited amount of

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argument

1 consideration that I should give to the fact that you say now,  
2 Judge, send it someplace else because we think we are going to  
3 raise an issue somewhere down the line that some other law  
4 should apply other than the law we have all been talking about  
5 all of these years.

6 MS. FERGUSON: Well --

7 THE COURT: I mean, you have never raised that issue  
8 in this case. That issue has never been raised.

9 MS. FERGUSON: These aren't our claims.

10 THE COURT: That's your claim. That's your issue.  
11 They're not raising that issue.

12 MS. FERGUSON: But the complaint, in a way it puts us  
13 at a considerable advantage because they don't say what the  
14 source of law is for these claims. They definitely don't say  
15 it is anything other than New York or Israel. They're silent  
16 on it.

17 THE COURT: They're not silent. They specifically  
18 said in their papers it is New York or Israel and those laws  
19 are not inconsistent with each other. If you have a different  
20 position you have not raised a different position with regard  
21 to what law applies until today when we started discussing  
22 this. Anybody is going to raise that --

23 MS. FERGUSON: Subsequent to the briefing the Second  
24 Circuit decision came out holding that it is not the place  
25 where the injury or the loss occurs that controls but the place

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argument

1 where the conduct occurred. So, there was a recent development  
2 that came off our briefs that we alerted the Court to in a  
3 letter so that's why this has come up, because there is this  
4 recent Second Circuit case decided after the briefing that  
5 makes not the law of Israel controlling but the law where the  
6 conduct occurred.

7 THE COURT: Well, even if I were to accept all of that  
8 argument it does not lead to the conclusion in the abstract  
9 that this case should be somewhere other than here because the  
10 majority of the activity that's at issue -- the activity that  
11 you say you want to rely upon and the situs of the activity  
12 that you say you want to rely upon is the minority of the  
13 activity that is at issue here, not the majority of the  
14 activity that is at issue here. So, you're saying that even  
15 though most of the activity affected U.S. citizens in Israel,  
16 you say because of the connection with activity that you say is  
17 attributed to the PLO or the PA in a different region should  
18 compel that the law of that region be applied. It is unlikely  
19 that you, on these facts, that that is going to be a compelling  
20 argument because that's not -- you have not even articulated  
21 that that's -- making that analysis would compel one to say  
22 that some other law other than the law of Israel or New York or  
23 the ATA should apply. You haven't even articulated such a  
24 position.

25 MS. FERGUSON: But with respect to the plaintiff's

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argument

1 claims that the PA and PLO's own conduct creates liability --

2 THE COURT: That's a limited part of the claim. That  
3 is a limited -- that is not the predominant part of the claim.

4 MS. FERGUSON: I am missing, then, what the  
5 predominant part of the claim is.

6 THE COURT: The predominant part of the claim is the  
7 injury and death that occurred at the locations that they  
8 occurred and its effect on United States citizens. That's the  
9 primary part of the claim. That's not a sophisticated thing.

10 You are saying that because they say the PLO made some  
11 decisions in the region that somehow that should mean that all  
12 of these claims should be decided in that region or according  
13 to that law. Now, if you want to make that argument maybe  
14 there will be appropriate time to make that argument but, right  
15 now, as an argument in the abstract, it is not a compelling  
16 argument for me to say that, you know, I should -- oh, that's  
17 too complicated in this case, it is much less complicated for  
18 some other unknown jurisdiction to go do that analysis  
19 separately even though we're litigating here, and somehow even  
20 a balance of convenience says it is more convenient for that to  
21 be done someplace else. You haven't articulated where and how  
22 it is more convenient or that there is really going to be any  
23 compelling reason, compelling evidence to indicate that the  
24 factors to consider are going weigh, somehow, more heavily  
25 somewhere else other than Israel or the United States.



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argument

1 MS. FERGUSON: I would just encourage your Honor to  
2 review the recent Second Circuit decision because with respect  
3 to the damages issues there you do look to the place where the  
4 injury occurred and that would be Israel.

5 THE COURT: You want me to review --

6 MS. FERGUSON: The Second Circuit decision.

7 THE COURT: I'm aware of the Second Circuit Licci  
8 decision. Very familiar with it, even before it was a Second  
9 Circuit decision.

10 MS. FERGUSON: I understand, your Honor.

11 THE COURT: I know what the issue is and I know the  
12 limited issue that they addressed and I know the more broader  
13 issue that I had to address before they got it and I don't  
14 think that that changes, at all, my analysis here. Matter of  
15 fact, it is very consistent with my analysis here. If you were  
16 standing here making an argument that you could articulate a  
17 basis to conclude that this litigation is more appropriate  
18 someplace else or some law is more appropriate to apply, then  
19 the laws that we have been discussing, then that would advance  
20 that argument. But, to argue in the abstract, well, we are  
21 going to argue at some point that maybe there is connections  
22 with the different region and that other laws might be laws  
23 that can be considered, that doesn't get you over the hurdle of  
24 trying to convince me on this record that I'm aware of at this  
25 point that somehow this is more appropriate for a region or to

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argument

1 apply some laws that are different than either the laws of the  
2 United States, New York, or Israel; I just haven't articulated  
3 the compelling place or set of laws that should apply instead  
4 of those.

5 MS. FERGUSON: I didn't know if it would be useful to  
6 have a briefing on some of these choice of law issues.

7 THE COURT: If that becomes relevant at the  
8 appropriate time. That's usually my response.

9 MS. FERGUSON: Our foremost argument is the lack of  
10 capacity argument, so thank you, your Honor.

11 THE COURT: You're welcome.

12 MR. SCHOEN: May I have a minute, your Honor?

13 THE COURT: Okay. I will give you one minute.

14 MR. SCHOEN: Your Honor, just in brief response.

15 I'm not sure how the last thing fits in with not  
16 kicking the can down the road but, in any event, I know  
17 Ms. Ferguson is trying but the idea here, it is just  
18 transparent. They have different experts in the region. There  
19 is no special expert for Varda Guetta. There are other mothers  
20 in the case who suffered the kind of injury and damage.  
21 They're the same experts, that's the whole point here why we  
22 don't dismiss the case here, it is the same trial.

23 THE COURT: I thought she was moreso -- maybe I am  
24 incorrect, moreso referring to experts on what law would apply  
25 rather than experts.

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argument

1 MR. SCHOEN: Those were two different subjects. She  
2 raised that and then raised this and because she said how  
3 difficult it is for them to conduct discovery in the United  
4 States. That's an argument for Congress. They're conducting  
5 the same discovery -- we have the ATA. Congress made that  
6 decision and the Licci case, again, nobody is going to tell the  
7 Court about that case, the Court knows the case better than  
8 anyone, but that has to do with the American Express Bank  
9 there, their only role in the case was transactions. That's  
10 not someone situated like Ms. Guetta or these other people  
11 because that case is already here. Are you trying that other  
12 case? In that case are you not otherwise trying a bank  
13 transaction case? The facts of this case are the facts of this  
14 case and that doesn't change whether these plaintiffs are in it  
15 or these state law claims are in it.

16 By the way, the idea of this Palestinian law and that  
17 they can just throw this out there again, we have lost all  
18 concept of burdens here. Again, they are the law. If there is  
19 law that's inconsistent or in conflict with New York or Israeli  
20 law, they should have told you that. It probably isn't,  
21 frankly, because of the mandated authority that operated there  
22 but I don't know, we don't need to guess. It is not an issue  
23 in this case.

24 Anyway, thanks, Judge.

25 THE COURT: This is what I am going to do because I

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argument

1 think it is time to move this case forward so I am going to  
2 rule today on both of these motions.

3 With regard to the defendant's motion I'm going to  
4 deny defendant's motion. I think that in this case that it is  
5 inappropriate at this stage of the proceeding to grant the  
6 defendant's motion to dismiss for lack of capacity on this  
7 record. I will do so without prejudice to revisit this issue  
8 on a record after discovery.

9 This is an affirmative defense. It is the burden of  
10 the defendant to prove this defense and it is the burden of the  
11 defendant to demonstrate on what evidence they intend to prove  
12 this defense of a lack of capacity either on summary judgment  
13 or before -- quite frankly, I'm not even sure that I can  
14 imagine a situation where this is a jury question but, you  
15 know, if there are factual disputes it could be possibly. But,  
16 clearly, it is the defendant's burden to prove its affirmative  
17 defense and having that burden the defendant can't simply rely  
18 on the pleadings or prior litigation. It must specifically  
19 point to evidence on which they say indisputably demonstrates  
20 that affirmative defense to the exclusion of any other  
21 conclusion. At this stage of the proceeding defendants have  
22 not done that nor are they in a position because no discovery  
23 is -- even outstanding discovery requests have not -- related  
24 to this issue have not yet been responded to.

25 So, on this record I think it is inappropriate for me

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argument

1 to dismiss this case based on any finding that the defendant  
2 has demonstrated and met its burden to demonstrate its  
3 affirmative defense of lack of capacity when there is no  
4 evidence in this record, there has been no discovery in this  
5 case, there isn't even an articulable set of facts that have  
6 been developed in this case for me to make a decision that  
7 these sets of facts demonstrate the affirmative defense of lack  
8 of capacity without disputed evidence and leading to only one  
9 conclusion for that, the PLO lacks the capacity and the PA  
10 lacks the capacity to sue and be sued on New York Law. In  
11 fact, the defendants even raised an additional issue by the  
12 discussion today with regard to which actual law applies. So,  
13 if the issue is to be whether or not and it is argued that  
14 somehow I should decline to assert jurisdiction over these  
15 claims because it is a complicated issue to determine which law  
16 applies with regard to non-federal ATA claims, then it is  
17 obviously I am not in a position if I can't even determine at  
18 this point that, which laws apply with regard to these claims  
19 that somehow the defendant has already met its burden to  
20 demonstrate that it has an affirmative defense with regard to  
21 the applicability of New York Law. One cannot argue that some  
22 other law other than New York Law would apply, might apply with  
23 regard to this or other issues and then say at the same time  
24 that indisputably they have a lack of capacity to be sued  
25 because New York Law says that they cannot be sued as an

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argument

1 unincorporated association. If the defense wishes to prove  
2 that affirmative defense and establish that affirmative  
3 defense, then they have an obligation to exchange this  
4 information and the evidence on that that they intend to rely  
5 upon, the specific evidence that they intend to rely upon, and  
6 then they have an obligation to meet their burden of proof to  
7 demonstrate that they are in fact what they wish this Court to  
8 conclude at this stage without any evidence in the record  
9 that's been developed during this litigation, that they are in  
10 fact an unincorporated association. As I stated, I think it is  
11 inappropriate for me to simply say that such a determination  
12 that that burden is met simply because Courts in other  
13 litigation, first with regard to specific issues that the Court  
14 was addressing, even with regard to similar issues that have  
15 been addressed in this Court, have made a determination that  
16 for the purpose of those issues that they would accept that as  
17 having a premise and that may prove, in this case, I see no  
18 evidence which I can review which gives me basis to understand  
19 that any Court has gone through an analysis -- a factual  
20 analysis with regard to the nature of the PA and the PLO, its  
21 establishment and its organization to articulate on what facts  
22 that an independent objective conclusion is to be made, that it  
23 is an unincorporated association and that its status is an  
24 unincorporated association would preclude their bringing  
25 non-federal claims under New York or Israeli law.

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argument

1           So, I'm going to deny that motion because the  
2 defendant is not able to demonstrate, based on this record at  
3 this stage of the proceeding, that they have indisputably an  
4 affirmative defense of lack of capacity that would preclude  
5 liability in this case.

6           Also, I am denying the application and decline to  
7 assert ancillary pending jurisdiction over the nonfederal  
8 claims. In this case, given all the consideration of what  
9 factors to consider with regard to assertive or decline to  
10 assert jurisdiction, primarily any issues that are  
11 determinative here that makes no sense to turn this one case  
12 into more than one case in more than one jurisdiction. There  
13 is no compelling argument for me to do that. The only  
14 compelling argument to, which would give me a scenario that's  
15 different than that is that, as I say as I heard it in a movie,  
16 to get one big falling object and turn it into a number of big  
17 falling dangerous objects isn't a compelling argument.

18           The only argument that this would somehow simplify  
19 rather than complicate for all parties and -- the argument that  
20 this would put a lesser burden than a greater burden on any of  
21 the parties would simply be the argument that I should decline  
22 jurisdiction because it would preclude the plaintiffs from  
23 pursuing these claims in any jurisdiction because of the  
24 statute of limitations. Again, that is not a compelling  
25 argument for me to decline jurisdiction if I know that it

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argument

1 simply denies the plaintiff the forum that they have already  
2 chosen and they have no reasonable alternative of forum at this  
3 point to resolve these issues and they have a legal right to  
4 resolve those issues in this forum. If they have a legal right  
5 to resolve these issues in this forum it is not compelling to  
6 say that I should decline jurisdiction knowing that they will  
7 be denied the right to go in an alternative forum because the  
8 statute of limitations has already run.

9 All of your arguments made with regard to the  
10 complication of proceeding with these issues and resolving  
11 these other issues, whether they would be in conflict of law  
12 issues or issues of practical discovery and trial, I think that  
13 this Court will be, whatever issues that this Court is  
14 confronted with in court, any additional Court that has to deal  
15 with those issues separately are going to also have to be  
16 confronted with.

17 So, I think that this Court, particularly since they  
18 are ATA claims and there are ATA claims which will not go away  
19 and those claims arise out of the same set of facts and actions  
20 which underlie all of the other claims and there is no related  
21 claims that don't arise out of the same set of facts, the most  
22 efficient and effective way to resolve the issues and the  
23 claims that arise out of the activities at issue is in one  
24 lawsuit in one jurisdiction and not in duplicate lawsuits in  
25 different jurisdictions simply because they're alleged as



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argument

1 different causes of action in different jurisdictions under  
2 different law.

3 So, I am going to deny both the motion for partial  
4 summary judgment -- I mean motion for judgment on the pleadings  
5 and I'm going deny the motion to assert jurisdiction over the  
6 pending ancillary claims.

7 There is also a motion -- I believe that there was  
8 also a motion by the plaintiffs to, alternatively, to convert  
9 this into a Rule 56 motion. I think that that is inappropriate  
10 at this stage of the proceeding. The defendants have not moved  
11 on the basis of independent evidence that's been disclosed in  
12 discovery. Both sides have clearly given indication and  
13 particularly the plaintiffs have given an indication that there  
14 is significant other evidence that they would be entitled to  
15 review in this issue to combat or to determine whether or not  
16 the defendants can assert the affirmative defense and so I  
17 think that given the status of discovery and the nature of this  
18 issue, that it would be inappropriate to convert this to any  
19 other motion and the motion as it was stated.

20 With regard to the plaintiff's motion to strike, I'm  
21 going to deny that motion. I think with regard to the issues  
22 that have already been resolved a motion to strike is  
23 unnecessary and is not appropriate spending time and effort on  
24 that.

25 With regard to the motion to strike based on waiver or

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argument

1 and/or failure to state -- sufficiently state the affirmative  
2 defenses, I find that the affirmative defenses, as alleged,  
3 have articulated what the nature of the affirmative defenses  
4 are and sufficiently put the defendant -- the plaintiff on  
5 notice as to what affirmative defenses, the nature of those  
6 affirmative defenses, and to the extent that there is a  
7 question about the underlying facts which would support those  
8 affirmative defenses, I believe that is appropriate for  
9 discovery. There it already has been the subject of discovery  
10 requests and those issues are to be resolved in discovery. To  
11 the extent that defendant does not wish to engage in discovery  
12 in those issues that are relevant to any of the affirmative  
13 defenses, then they can withdraw those affirmative defenses or  
14 those affirmative defenses can be precluded.

15 So, I think that the appropriate thing is to move  
16 forward efficiently with discovery at this point. I think that  
17 I am not satisfied with the pace of discovery. I think I told  
18 Magistrate Judge Ellis that I expected him to be firm with  
19 discovery. I have also indicated to him that any position, if  
20 I deny the motions that are on standing here, my issue is going  
21 to be that any position is going to be that other than one  
22 summary judgment motion after the close of discovery, there are  
23 to be no other motions filed without first a pre-motion  
24 conference with Magistrate Judge Ellis, and that pre-motion  
25 conference must be preceded by no more than a two-page letter

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argument

1 indicating what the nature of the motion is that the parties  
2 believe are appropriate at this stage of the proceeding and the  
3 nature of the motion and the underlying basis for the motion  
4 and why the motion is timely made and is not premature in  
5 discovery motion.

6 I think that the motions that have been made, there  
7 have been too many piecemeal motions and I think one issue that  
8 we have discussed and I think that primarily some is probably  
9 even related to the plaintiff's motion to strike in an attempt  
10 to preclude piecemeal, untimely motion, I will be able to  
11 preclude that from all parties at this stage of the proceeding.  
12 All the motions to dismiss should have been made. If they have  
13 not been made I think you need to have a pre-motion conference  
14 with the magistrate judge and give him that letter and tell him  
15 what motion you intend to make and tell him why that motion is  
16 not untimely or premature short of completion of discovery and  
17 summary judgment.

18 So, the parties should move forward to complete  
19 discovery, move forward in anticipation of full summary  
20 judgment briefing if that's the step to take after discovery,  
21 and to anticipate that you will be spending, devoting your time  
22 to completing discovery on these issues for the rest of the  
23 year rather than engaging in further motions generating other  
24 pleadings or generating other claims or affirmative defenses.

25 So, what I am going to do is I am going to schedule

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argument

1 before me -- discovery is supposed to be completed in December.  
2 I am going to schedule before me a conference January 17th at  
3 10:00. We may not have to meet on that date. If things move  
4 efficiently I would anticipate that you would be complete with  
5 discovery by then and you can agree upon a motion schedule for  
6 full summary judgment submission and you can give me that  
7 schedule and then I can, unless there are other issues to be  
8 addressed on January 17th, we can move that date until after  
9 the summary judgment motion is fully submitted and if you want  
10 to be heard on summary judgment motion.

11 So, as I say, I am going to have further conversation  
12 with Magistrate Judge Ellis to make sure that things are moving  
13 efficiently and that he makes sure that they're moving  
14 efficiently. If, for some reason, there are some applications,  
15 letter applications that are submitted to Magistrate Judge  
16 Ellis and he holds a pre-motion conference and he determines  
17 that it is a timely and not premature motion that should be  
18 addressed in substance on its merits, then he can indicate to  
19 me the nature of that motion and I will grant him the authority  
20 to tell the parties to go ahead and brief that issue for me or  
21 for him or make an independent determination based on my review  
22 of the nature of the letter response -- the letter and response  
23 and the record before him at the conference whether or not  
24 that's a motion that is both ripe and timely to be made in this  
25 case.

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argument

1           Otherwise, I will see the parties on January 17th at  
2           10:00 and we will see where we are at that point in time. If  
3           any issues arise with regard to discovery, they should be  
4           raised in writing right away with Judge Ellis. If we need to  
5           meet again before that time let me know and I will schedule a  
6           conference before me to address any issues that need to be  
7           addressed before that time. But, otherwise, I will instruct  
8           Magistrate Judge Ellis to make sure the parties are on schedule  
9           and move forward efficiently and resolve quickly an issue that  
10          might otherwise delay the completion of discovery in this case.

11           Is there anything else we need to address?

12          MR. SCHOEN: No, your Honor.

13          THE COURT: Anything else by defense?

14          MS. FERGUSON: No, your Honor.

15          THE COURT: Thank you, and I will see you, and good  
16          luck and I will talk to Magistrate Judge Ellis as soon as I get  
17          off the bench.

18          MR. SCHOEN: Thank you.

19          MS. FERGUSON: Thank you.

20                   o0o